Investment Liberalisation under FTAs and Some Legal Issues in International Law

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Introduction

Due to the unprogressive negotiation to drive the execution of trade negotiation of the DOHA Round under WTO's scope, many countries resort to negotiation of the bilateral free trade agreement. However, nature and conditions of this new kind free trade agreement are different from those of free trade agreements made in the past especially in terms of investment liberalization and investment/investor protection including dispute settlement mechanism as well as level of trade and service liberalization and stringent intellectual property protection. The negotiation of bilateral free trade agreements which is commonly called FTA is, in fact, the matter of Preferential Treatment Arrangement. Therefore, the current bilateral FTA is a non-balance mechanism due to the different bargaining power of the parties. The current model of the bilateral free trade agreement (FTA) is neither a good mechanism for trade and investment liberalization nor it can replace the Rule – Based Market Economy. This article will analyze and explain the reasons why the current model bilateral FTA is not a suitable and proper instrument for the global market economy.

The Evolution of Foreign Investment and the Development of Foreign Investment Laws

In order to understand the interaction of the economic system and the regulatory regime of investment liberalization, one must inevitably look into the evolution of foreign investment and the development of foreign investment regulation as a dynamic process. In fact, the evolution of modern foreign investment and international law on foreign investment can be traced back to the colonisation period, and the protection of foreign investment has existed since then. However, foreign investment and international investment law have evolved over time.

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In the early stage of the expansion of foreign investment, which generally took place in the colonies of the states of investors (Sornarajah, 1994: 9; Fisher, 1988: 96-7), investment protection was integrated within the colonial legal system of the imperial powers, which gave sufficient protection for the investment in those colonies (Hopskins, 1980: 787). Even if the investments were made in areas that remained uncolonised, a blend of diplomacy and force ensured that these states did not interfere with foreign investors (Sornarajah, 1994: 10). Thus Colonial power was the final arbiter of foreign investment disputes in this early period.

The ending of colonialism totally changed the condition of foreign investment and its regulations. The newly independent states struggled not only for freedom from their former colonial power's economic dominance, but also for a new world order which would permit them more scope for the ordering of their own economies and access to world markets (Sornarajah, 1994: 1). This was a period of hostility and antagonism toward foreign investment, generated by nationalistic fervour. Nationalism was itself a result of the anti-colonialist movements which spread throughout the colonised parts of the world. Thus after decolonisation, the newly independent states endeavoured to recover control over vital sectors of their economies from foreigners, largely nationals of the former colonial powers. The result was a wave of nationalisation of foreign properties. This trend towards nationalisation in host developing countries resulted in intense debates on the legal problem of foreign investment protection. The international law on foreign investment has been developed and the issue of nationalisation, or expropriation, and rules of compensation and the general regulation for protection of foreign properties in host states have been seriously constructed, in the context of conflicts between developed and developing countries, especially Latin America[2].

The emergence of the "Calvo Clause" or "Calvo Doctrine"[3] severely shook the stability of foreign investment in developing host countries that adopted this doctrine, as this uncertain situation placed foreign investors at risk. International lawyers and scholars therefore sought to establish an international standard for legality of expropriation that should be based on national treatment or non-discrimination, non-violation of specific undertakings, and on the ground of public purpose with due process of law and judicial review. This contradicts the traditional view of developing countries, which referred to provisions in

[2] Historically the protection of foreign properties has been built up as a part of the area of diplomatic protection of citizen abroad and of state responsibility for injuries to aliens. It is possible to link the protection of foreign investment to the already existing norms on the diplomatic protection of aliens. So the roots of the international law on foreign investment lie in the effort to extend diplomatic protection to the assets of the alien. On this basis, the extension of the right was contested from the time it was attempted on the ground that it leads to the unwarranted interference in the domestic affairs of the host states.

[3] In 1896, the Argentine Jurist Carlos Calvo asserted that rules governing foreign investment should be based on the concept of national treatment and the relevant rules of domestic law should not be modified by norms of international law. See Dolzer, Rudolf and Stevens, (1995); Margrete (1995), also see Sornarajah (1994), chapter 6 and Muchlinski (1995), chapter 17, p. 626 for discussions of the "Calvo Doctrine". The national treatment accepted in Calvo Doctrine is that foreign investors are to be accorded treatment no better than that given to the domestic investors, regardless of whether such treatment falls below international minimum standards. Thus, in the case of nationalisation, if domestic investors do not receive compensation, foreign investors do not have a right to be compensated alike.

domestic law[4]. However, it is generally accepted in international law that a state has a right to expropriate or nationalise a foreigner's properties, provided that such expropriation takes place on the ground of public purpose or public interest, without discrimination and with lawful compensation[5]. The legal requirement of compensation when expropriation takes place, according to the "Hull formula", must provide prompt, adequate and effective compensation. However, this conflict was later on compromised by using the terms like "just", "full", "reasonable" or "fair and equitable" based on the fair market value or genuine value of the asset taken, by providing these terms in the bilateral investment treaties concluded between the host and home states. The loosening of the strict rule of the Calvo Doctrine was simply because foreign investment was needed in developing countries.

The assertion of national treatment is considered to be the normative rule applied to foreign investors. In fact, the historical development of international law on protection of aliens' properties went further than national treatment. It required external standards of treatment for aliens. This theory asserted that the treatment provided to the nationals in a host state may be low and therefore unacceptable. This is the source of "the minimum international standard of treatment" applicable to foreign investors invoked by the developed capital-exporting countries. Both views consolidated the concept that the law should be designed to further the free movement of trade and investment. And this can be realised when the foreign investors have sufficient protection wherever their investment activities take place.

But the scenery in the foreign investment sphere was altered again by the changes in the international political and global economic situation. Among these conditions one can see the surge of transnational corporations, and the establishment of their networks in both host and home countries. TNCs have been an important source of private capital in the world economy. Where capital is scarce, private capital is the only possible resort for developing countries. The increasing role of TNCs in economic development in many developing countries especially in the East Asian countries, which has been evidenced by their high economic performance, has stimulated other developing countries to promote foreign investment.

However, in the early stage of industrialisation in developing countries, there was still a firmly established fear that a new period of economic dominance would be ushered in by an unfettered flow of foreign investment, and that the entry of powerful multinational corporations would lead to external control of their economies instead of contributing

[4] More than 100 developing countries overwhelmingly voted for passing the General Assembly Resolution (G.A. Res. 3281) in 1974 establishing the Charter of Economic Rights and Duties of States, and they were especially in favour of Art. 2(2) (c) of this Resolution.

[5]. According to Schwarzenberger, the applicable law can be stated in two well-established rules of international customary law: (1) state property; the property of sovereign states situated abroad is immune from the jurisdiction of the territorial sovereign, (2) private property; in principle, private property is subject to the municipal law of the sovereign state in which it is situated, then such property may be expropriated in the public interest, without unjustifiable discrimination, and on payment of full or adequate, prompt and effective compensation.

sufficient economic advantages to the host states. Thus there was an increasing consciousness that the best way of resolving this dilemma was to admit foreign investment on a selective basis[6] and ensure that such investment promoted the economic objectives of the host state while earning profits for foreign investors.

The concurrence of developing countries' perception and the need to attract inward foreign investment made them exploit economic policy instruments by promoting foreign investment and export-orientation. Thus foreign investment promotion packages, including tariff and non-tariff incentives, have been multiplied for attracting foreign investors. But at the same time this policy came along with the regulations of entry to control and screen the influx of foreign investment. Moreover, investment measures such as local content requirements, export-performance requirements, trade-balancing requirements, local equity requirements, limitation on remittances of profits and manufacturing limitations have been employed as instruments to gear economic development in developing countries toward industrialisation and export promotion. The aims of such regulation and investment measures are to attract foreign investment into the country while ensuring that investment is geared toward the economic goals of the host state of foreign investment, and that potential harmful effects on such goals are eliminated.

The Changing Attitude toward Foreign Investment of Host Developing Countries and the Liberalisation of Investment Laws

The changing global economy has altered the attitude of the host developing countries again and, accordingly, national investment laws and regulations in these countries have been modified. The emergence of industrialisation and the debt crises in developing countries as well as the recession in capital exporting countries precipitated a shortage of funds for foreign investment. Thus this situation forced developing host countries to welcome FDI bringing capital to the host country.

The position of developing countries in attracting FDI was even worse when this happened in conjunction with the global trend of foreign direct investment, which increased concentration in developed countries, especially as the sectoral composition of FDI shifted toward tertiary industry (United Nations, 1993: 20). The global pattern of foreign direct investment can now be characterised as tripolar, with the EU, the United States and Japan being the members of the “Triad”, as they are the largest host and home countries for FDI. In 1995, the Triad accounted for 85% of total outward stock and 65% of the total inward stock of FDI (UNCTC, 1991; UNCTAD, 1996b). Indeed, the share of FDI directed to developing countries has continuously declined from 26% in the mid-1970s to less than 20% in the late 1980s, and further declined to only 17% (amounting to US$ 32 billion worth of FDI flow) in

[6] As a Vietnamese leader pointed out “If the door is kept open, it is not only the wind but dust and flies also that get in” cited in Cohen, J. (1990) *Foreign Investment in Vietnam.* Hong Kong: Longman. p. 1.

1990. The change is more dramatic in the case of Japan, which has traditionally invested a large share of its capital in developing countries. By the end of the 1980s, Japan directed 46% of its total outflows of investment to the United States and 20% to the European countries. As a result, Japan's position in developing countries declined from 42% of its own total foreign stock in 1986 to 34% in 1988. Even though in 1995 the inflows of FDI to developing countries increased to US$ 100 billion, only South, East and South East Asia continued to be the largest host developing region, with an estimated US$ 65 billion of inflows, accounting for two-thirds of all developing country FDI inflows, and some Latin American countries are the recipients of the rest[7]. Nowadays, the FDI flow directs to China that accounts for approximately 70% of the total investment that flow to developing countries.

A major reason for the increased concentration of FDI in developed countries is the shifts in sectoral composition of FDI in favour of the tertiary sector[8] (the service sector) which now has a more important role in the global economy as a result of the liberalisation of financial markets and services. As Japan, the United States and the European countries compete with each other in their large developed market, so they have to maintain their share of business and economic activities through their networks of TNCs and by huge investment there. Thus the growing concentration of FDI within the Triad and the development of regional networks of TNCs around each Triad pole have been matched by increased concentration of economic activity and trading within developed countries. This means that developing countries as a whole have to compete with each other for a relatively small share of foreign investment.

In addition, the ending of the Cold war between the superpowers, and the opening of the former Soviet Union, the Eastern European economies, China and Indo-china have made new demands on capital. This situation has made world capital scarcer. So, fierce competition for foreign investment among developing countries has resulted in the deregulation of investment controls as well as the opening up of financial markets and the liberalisation of the service sector in those countries.

Apart from changes to internal laws and regulations, developing countries, especially the previous centralised-economy countries, have increasingly made bilateral investment treaties with capital-exporting countries[9]. The reason for the treaty activity of these previous socialist countries may be to dispel perceptions that they are high risk countries. Thus from the 1980s onwards one can see a surge of bilateral investment agreements concluded between host and home countries (UNCTAD, 1998b: 10)[10] to ensure the protection of foreign

[7] Argentina, Brazil, and Mexico in Latin America, Singapore, Malaysia, Thailand, Hong Kong, China, Korea, and Taiwan in South East Asia and Egypt in Africa.

[8]. Economists have classified industry into three categories: the first sector is agriculture, mining and oil extraction industries; the second sector is manufacture or other kind of production industries; and the tertiary sector is services and real estate industries. See Dunning, John. H. (1993) *Multinational Enterprises and the Global Economy*.

[9] "China which announced its 'open door policy' in 1984 has rapidly signed over 50 treaties within 10 years. Vietnam has signed 15 BITs within 3 years, 1991-1993. And the Soviet Union has signed 14 BITs between 1989-1990": Dolzer and Stevens, 1995.

[10] UNCTAD (1998b) reports that "(D)uring the 1990s the number of BITs has increased dramatically. By the

investors' properties in those countries and to promote foreign investment (as will be discussed in more detail in the next section). These treaties have been seen to boost investor confidence in the host state and, as a result, more investment flows can take place. This may be regarded as a factor influencing the locational decision of FDI, although not a decisive one compared to the other political and economic factors such as a favorable investment climate and environment attraction.

There are also increasingly bilateral investment treaties between developing countries, as some of them, the newly industrialised countries, become capital-exporting countries investing in other developing countries[11]. Then they have also concluded BITs between them, such as the treaties between Singapore and Sri Lanka, Thailand and Bangladesh, China and Vietnam, Korea and Malaysia, etc[12].

The competition for foreign investment among developing countries has resulted in not only the deregulation of investment law and regulations as well as the surge of BITs, but also changing attitudes toward foreign investors. It has ended the hostile attitude toward foreign investment, and many developing countries have turned to pamper foreign investors. As Mohamed Ariff put it:

> "Ironically, more often than not that the local investors in (developing countries like) ASEAN countries who feel that they are being discriminated against while foreign investors are being pampered" (Ariff, 1993: 40).

Thus the past half century has seen a sharp swing in the attitudes of countries towards FDI, and national investment regulatory regimes have evolved over time according to economic necessity, from protection to restrictions and control, to facilitation and liberalisation. Again, the rules of the game in today's world economy have changed. Now many of the investment measures that were mainly used in developing countries are regarded as trade-distorting measures (Moran, 1992b: 62-3)[13]. These measures were studied and their

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end of 1996 a total of 1,332 such treaties existed, of which 824 were concluded by developed countries…..The number of BITs concluded between developing countries and economies in transition has also increased dramatically during the 1990s, from 64 by the end of the 1980s to 508 at the end of 1996".

[11]The NICs are relocating less technology-intensive industries to other developing countries as the latter are sources of cheaper labour and products made in these countries are able to have greater access to markets of developed countries due to the generalised system of preferences. For instance, Singapore was removed from the list as it became an industrialised country. Among other economic reasons are developing countries which that fear such graduation will seek to promote investment in other less developed countries.

[12] Among developing countries, more than 90 capital-importing countries are now parties to bilateral investment treaties: in the Caribbean, 11 states have entered into at least one treaty each. In Africa, 40 states have concluded BITs. In Asia, 19 states have signed BITs, especially China has concluded 57 treaties and 43 of them are concluded with developing countries. For details of the texts see the ICSID compilation of *Investment promotion and protection* (loose-leaf publication).

[13] Actually investment measures have been widely used in both developed and developing countries but the measures like local content requirements, export-performance requirements and local equity requirements are mainly used in developing countries and these are regarded as trade-distorting measures. In fact, the measures such as cash grants or tax breaks used in developed countries like the United States and European countries are also trade-related investment measures. For instance, European governments offer cash grants up to 60% of the

economic effects assessed by scholars and economists, especially in the United States, which was seriously concerned at this problem. Research has shown that investment measures have affected trade and investment flow (Guisinger and Associates, 1985). Thus trade-related investment measures are regarded as a kind of trade barrier to be eliminated. This brought about the inclusion of the trade-related investment measures issue into the agenda of the GATT Uruguay Round, and finally the Agreement on Trade-Related Investment Measures (TRIMs) was concluded. This was the first step to linking investment issues with trade issues within the umbrella of the WTO.

However, the development of the regulation of international investment was already taking place outside GATT since the 1960s under the scope of other organisations such as the OECD, the United Nations, UNCTAD and the World Bank. In the initial stage, attempts were made to elaborate on a comprehensive code and to introduce norms on the control of the conduct of multilateral corporations[14]. The rationale of this task was to liberalise international investment and to protect foreign investment. The most important reason behind the process was to create multilaterally agreed norms and to enhance an international rule-oriented regime in the international investment sphere.

The Interaction of Legal and Economic Factors in FDI Policy

The discussion in the earlier sections shows the complex strands of the evolution of the economic and political factors shaping investment laws and policy of nation states. This section will analyse more specifically the interaction of legal and economic factors in FDI policy at the national level, and shows how this evolution of the interaction has influenced the process of investment liberalization

This part focuses on the investment and FDI issues, i. e. the impact of the global economic and legal environment and the changes in developing countries' national investment laws and policy. This leads to the process of development of a liberal investment regime.

Economic theories on investment, and political ideologies, have influenced nation states in choosing their legal pattern and FDI policy (discussed below). Also the legal factors and economic theories have contributed to the growth of TNCs in various aspects such as the ownership structure and legal form of TNCs, liabilities of TNCs, anti-competitive practices, and patent and trademark protection. Legal factors also influence locational decisions and internalisation of TNCs. Economic theories influence the legal choice of methods for controlling and regulating FDI i. e. screening FDI or restriction of FDI entry, reserving restricted investment sectors, managerial control, or on the other hand encouraging FDI by

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cost of the entire investment to attract automobile, petrochemical and computer industry investment, while the United States have given as much as US$ 325 million per project or US$ 108,000 per job to foreign firms. It is incredible that average state expenditures in the United States to induce in ward investment and promote export has grown over the last decade by more than 600%: "It would be disingenuous to argue that such efforts are not trade-related investment measure", see Moran, 1992b: 62-3.

[14]. For a detailed discussion on the codification of international standards for the treatment of foreign investment, see Muchlinski, 1995: 573-616, also see Schwarzenberger, 1969, 109-181.

using investment incentives. Various legal patterns and FDI policy options have been chosen/adopted by countries depending on the economic theory/perspective that the country espoused. The economic theories/perspectives include[15]:

i. the Neo-liberal perspective which favours an open market economy;

ii. the Orthodox economic perspective which concerns TNC control policy;

iii. the Marxist perspective which centres on monopoly capitalism and imperialism;

iv. the Nationalist perspective which fears that large foreign firms undermine host state political and economic independence and threatens cultural identity so that states may impose control on TNCs;

v. the Environmentalist perspective which concentrates on the ecological effects of TNC operation;

vi. Global consumerism which concentrates on the creation and maintenance of long-term employment for the consuming public. Therefore, employment stability is a policy consequence of furthering consumerism, given its faith in economic growth and increasing consumption.

Legal Framework governing Foreign Direct Investment

The multilayered legal frameworks governing foreign direct investment consists of international law, WTO rules and regulations relating to investment, international code of conduct and guideline for transnational corporation, national investment laws, administrative regulations and policies as well as bilateral investment agreements that have been developed for ensuring the protection and fair treatment of foreign investment[16]. In fact, there are no comprehensive international investment regulations existing in today's world[17] but rather the BITs networks (Bilateral Investment Treaty) that governs the international investment activities in addition to the national investment laws and regulations. As Muchlinski has pointed out,

> "if one were to look at legal sources alone the MNE [multinational enterprise] would not exist: all one would find is a series of national companies whose principal shareholder happens to be a foreign

[15] Muchlinski (1995: chapter 4) also see Dudley Seers (1983), Johnson, H. G. (1965).

1See UNCTAD (1988:1).

[17] See Sornarajah (1994: chapter 6, p. 225-236) Also see Schwarzenberger, G. (1969: 109-20).

company, and/or a network of interlocking contracts between entities of different nationalities". (Muchlinski, 1995:lv).

Therefore MNEs or TNCs (the terms are used interchangeably) are mainly subject to national laws of the host countries, where they are established, that vary considerably and have different standards regulating FDI. This is because it is accepted in international law that nation states have sovereignty to screen and control foreign investment or even to expropriate foreign properties[18]. Thus, the entry and establishment of foreign investors is generally left to the host country's discretion.

In the international sphere, under such circumstances, the interaction of the home and host states of FDI, and the TNCs, which are the three main players of international investment, encounter difficulties and conflicts in the treatment of FDI, in various aspects. The problems range from double taxation, repatriation of profit, expropriation, compensation, employment of TNCs' staffs, operation of the TNCs to environmental protection, labour relations, technology transfer, group liabilities, the liabilities of directors, accountability, disclosure, and anti-trust.

In order to seek solutions for such problems, the three players must compromise on a rule-based approach. On the one hand, there is a need for some standards/guidelines for regulating firms' behaviour and their liabilities/responsibilities to host and home countries. This entails a certain level of coordination or harmonisation of national controls by host and home country over TNCs, by trying to set international standard or a common agreed set of rules and regulations governing FDI. Countries, especially developed capital- exporting countries, and various international organisations[19] have endeavoured to reach these aims[20] and to tackle the problems of legal disparities among nation states.

However, in the international sphere, it is difficult to develop a multilaterally agreed set of rules for governing FDI[21]. BITs have thus developed in order to provide a certain level of legal stability and are now relied upon by developed capital- exporting countries as part of their effort to safeguard the investments of their nationals[22]. However, BITs do not entail host country investment liberalisation[23] but rather, as mentioned above, ensure the protection of

[18] Schwarzenberger, G. (1969).
[19] See UNCTAD (1996c: Volume III) also see Muchlinski (1995: 573-616) and Sornarajah (1994:187-224). However, they were mainly developed in a "soft law" form.
[20] See UNCTAD (1996c) extensively discussing various agreements on FDI, also see Muchlinski (1995: chapter 16.) discussing the codification of international standard for the treatment of foreign investors. But so far they have not yet achieved hard law multilaterally agreed rules for host and home countries of FDI, and only BITs have developed as the main instruments for FDI, see Muchlinski (1995: chapter 17), Dolzer &Stevens (1995), Sornarajah (1994: chapter 6).
[21] This is due to the conflict of interest and the different ideologies between developed and developing countries and countries of different political systems therefore the host and home states of foreign investment cannot reach the same criterion or agreed rules for the FDI, see Sornarajah (1994: 27-29).
[22] See UNCTAD (1988:1).
[23] Investment liberalisation is regarded as the main issue as foreign investors require an equal right of entry and

foreign investment in the host country. BITs are generally based on negotiations between the host and home countries, hence the terms and conditions of BITs vary depending on the position of the contracting parties to each BIT.

Under such circumstances, investment liberalisation would be made at a national level under national investment laws and regulations depending on the host countries' policy, which shows the interaction of economic factors in legal and FDI policy. It appears that hardly any country fully liberalises investment without any conditions. Even though there has been a surge of investment liberalisation, especially when investment capital is needed by developing countries, such liberalisation always requires foreign investors to comply with national investment priorities or to meet conditions for obtaining investment incentives. Countries compete with each other to attract FDI and to offer attractive national investment laws and regulations, so few disciplines have been agreed especially in relation to investment requirements and incentives. This situation both allows TNCs to gain windfall profits from regulatory/treaty shopping, while on the other hand they encounter difficulties from the regulatory differences in host countries.

The implementation of regionalisation, especially the regional integration arrangement that focuses on investment liberalisation, thus has been regarded as a "fast track" in investment liberalisation[24] contributing to the process of global investment liberalisation, and this further contributes to the development of a multilateral agreed set of rules governing FDI. It is argued that regionalisation and the establishment of international investment regulations are complementary. On the one hand, regionalisation would help enlarge the liberalised investment areas so that it would be easier to establish a common set of rules for international investment. Once many parts or regions of the world have liberalised, they would have similar standards, rules and regulations so that it would be easier to converge such rules and regulations towards common models. On the other hand, if a multilaterally agreed set of rules could be established and accepted by nation states, it would also be a great contribution to the further liberalisation of international investment. Because investors could freely invest subject to the same rules and regulations in any country they consider appropriate, they would have more confidence and security in their investments. The interaction of regionalisation and the establishment of an international standard are closely linked to the international economic changes and evolution, as well as the nation states' policy adjustment that was also affected by the international economic environment

Legal and Policy Implications for States

The implications of the global strategies and structures of TNCs are that nation-states are no longer the only players in law and policy determination. Nation states need to take a

establishment in host countries.

[24] See UNCTAD (1999a: 22-28).

worldwide perspective in designing laws and regulations as well as the economic policy. For instance, if a country employs protectionist measures, they could hurt those of their export-oriented national firms that are located abroad[25].

In the past, many host country governments were suspicious of foreign investors (Muchlinski, 1995: 6-7), afraid that they would dominate in competition with local firms for domestic market share and damage domestic industries; in other words, the fear was about foreign control of local economies. Fear was growing that TNCs would completely conquer the economy of the host countries. Moreover, they feared that TNCs were a threat to their sovereignty. They believed that there were sensational abuses of international corporate power, especially by US firms. The US government itself was aware of this situation and checked abuses by its own corporations. This resulted in, for example, the passage of the Foreign Corrupt Business Practice Act in 1977 (Muchlinski, 1995: 7).

Because of these circumstances, almost investment codes and national regulations imposed restrictions on foreign investors. Those restrictions included limiting foreign participation in the ownership of local firms, imposing local-content requirements and import-compensation ratios and making technology transfer a prerequisite for FDI approval. The rationale for investment policy was to strengthen the national economy by pursuing two objectives: to protect national firms against powerful competition from TNCs, and to use FDI as a tool for the industrial development of their countries. Therefore, foreign firms were welcomed as long as they were proved to be able to contribute to national economic development. FDI was prohibited in some industries that were considered as having strategic importance for the national sovereignty to the country, for instance, the defence-related industries, telecommunications, transportation, steel, electricity, water and gas, as well as the production of commodities for export that were crucial for strengthening the domestic currency (Michalet, 1994: 16).

Since the late 1970s, government attitudes towards TNCs have changed drastically (Muchlinski, 1995: 9-11; Michalet, 1994: 16; Sornarajah, 1994: 8-20, 68). Instead of being suspicious of TNCs, governments now welcome them. Especially when capital has been scarce, countries compete fiercely with each other to attract foreign investment. Michalet pointed out that “investment laws and regulations in most countries have been changed dramatically”[26]. With a global strategy, outward FDI as well as mergers and acquisitions are

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[25] . Portable electric typewriters from Singapore, 1993 ITC LEXISs 642 USITC Publication. United State International Trade Commission, Investigation No. 731-TA-515 (Final) September 1993. The petitioner in this investigation, BIUSA, was a wholly-owned subsidiary of Brother Industries Ltd. Nagoya, Japan. It is a significant U.S producer of portable electric typewriters was damaged by the increased importation of portable electric typewriters from Singapore produced by Smith Corona, the American subsidiary located in Singapore. The US International Trade Commission encountered difficulties to decide "who is US"? Because the American company in the USA is a Japanese subsidiary and the Singaporean company is an American subsidiary in Singapore. This is a good example that if any country applies protectionist measures against the other country it could hurt their own national firm located abroad.

[26] See Michalet (1994). Many Asian countries began to liberalise investment rules in order to attract FDI, particularly in conjunction with investment incentive packages. BOI offices were established in each country to monitor foreign investments. The surge of industrialisation began in the 1970s in this region, even though in that

all aimed at strengthening a firm's competitiveness in the world market. Therefore, local constraints, complex regulations etc., are no longer acceptable to TNCs because they increase transaction costs and thus affect their international competitiveness. Michalet pointed out that "a global firm is not ready to spend a lot of time negotiating with a host country government; instead, it looks for another, more convenient location". Thus, countries appear to be no longer in an absolute position to screen and control potential investors, as was the case in past decades.

In most countries, investment codes have been liberalised, incentives have been used and administrative procedures have been simplified. At the same time, countries have established investment promotion agencies to attract and service foreign investors in order to improve the country's image abroad and to implement promotion strategies. Foreign investment promotion is the key priority of host countries. As trade-related investment measures have to be eliminated[27], countries are replacing them with alternative strategies: creating an attractive investment climate, the liberalisation of FDI laws and regulations, and opening service sectors and financial markets. Ultimately, the ongoing liberalisation of foreign investment regulatory frameworks may reduce inward investment controls and strengthen FDI protection, as well as promote the free flow of foreign investment.

In conclusion, nation-states now aim to enhance the essential factors considered as the main determinants for inducing FDI. TNCs now demand trained human resources, good communications and transportation networks and an overall high standard of infrastructure from the host countries, as well as transparent and stable laws and regulations, social order and political stability. The nature of the comparative advantages that make a territory attractive in today's economic world is no longer only the result of natural endowments but increasingly of created ones. Comparative advantages are built up, firstly, by the activities of foreign affiliates and their linkages with local firms, and secondly, by governmental measures aimed at improving a country's investment climate. The latter is directly concerned with policy adjustment and law making in the host country, and this interdependence between the law and the economy means that the two have to be consistent and complementary.

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period policies aimed not at generalised liberalisation but rather to liberalise investment in particular areas. See ESCAP (1998) for detailed studies of investment liberalisation in APEC economies since the 1970s. Also Latin American countries which were previously hostile to FDI turned to welcome foreign investment due to their need of capital. Also privatisation began to be implemented in various countries especially in Europe and North America, Parker, David (ed.) (1998).

[27]. According to the Agreement on Trade-Related Investment Measures, developed countries have to abolish TRIMs within 2 years while developing countries oblige to eliminate TRIMs within 5 years from the year the agreement was signed.

The Interaction between the Global Economic System and the Regulation of International Investment

The regulation of international investment consists of laws and regulations in various forms and at different levels. Foreign investment is subject to domestic investment law and regulations of the host country and the investment-related laws of the home country, as well as the regulation of international investment in the international sphere, ranging from bilateral investment treaties to regional investment treaties and multilateral investment treaties. There are also several forms of regulation, e.g. Treaty, Code, Guidelines and Model Treaty. The regional level may involve a supranational regulatory authority established by a group of countries having common economic interests in a defined geographical area. The multilateral level involves regulation by a substantial majority of the world's states usually acting through intergovernmental organizations.

Throughout the period of the evolution of foreign investment and the development of the regulation of international investment one can see the close interrelation and interaction between TNCs, host and home states in the changing international economic system (Muchlinski, 1995: 90-114; Sornarajah, 1994)

The following table presents the jurisdictional levels of foreign investment regulation and provides example of some important agreements of such level.

Table 1

International Investment Arrangements

National level		Regional level	Global level
National Law	**Bilateral Treaty**		
National investment laws and regulations	Treaties of Friendship Commerce and Navigation	1961 OECD Code of liberalisation of Capital Movements	1948 Havana Charter
	Bilateral Investment Treaty, Bilateral Double Taxation Treaties		
		1961 OECD Code of Liberalisation of Current Invisible Operations	1958 Convention on the Recognition and Enforcement of Foreign Arbital Awards
		1963 OECD Model Tax Convention on Income and on Capital	1962 UN GA Resolution 1803 (XVII) : Permanent Sovereignty over Natural Resources
		1967 Revised Recommendation of the OECD Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade	1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States
		1967 Draft Convention on the Protection of Foreign Property	1974 UN GA Resolution 3201 (S-VI) : Declaration on the Establishment of a New International Economic Order and UN GA Resolution 3202 (S-VI) : Programme of Action on the Establishment of a New International Economic Order
		1969 Agreement on Andean Subregional Integration	1974 UN GA Resolution 3281 (XXIX) : Charter of Economic

		Rights and Duties of States
	1970 Agreement on Investment and Free Movement of Arab Capital among Arab Countries	1976 Arbitration Rules of the UN Commission on International Trade Law
	1973 Agreement on the Harmonisation of Fiscal Incentives to Industry (Caribbean Common Market)	1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy
	1973 Treaty Establishing the Caribbean Community	1979 UN Draft International Agreement on Illicit Payments
	1976 OECD Declaration on International Investment and Multinational Enterprises	1979 UN Model Double Taxation Convention between Developed and Developing Countries
	1980 Guidelines Governing the Protection of Privacy and Trans border Flows of Person Data	1980 The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices
	1987 Revised Basic Agreement on ASEAN Industrial Joint Ventures	1983 Draft UN Code of Conduct on Transnational Corporations
	1987 Agreement Among the Governments of the ASEAN Countries for the Promotion and Protection of Investment	1985 Draft International Code of Conduct on the Transfer of Technology
	1994 Protocol of Colonia for the Reciprocal Promotion and Protection of Investment in the MERCOSUR	1985 Convention Establishment the Multilateral Investment Guarantee Agency
	1994 Protocol on Promotion and Protection of Investment from States not Parties to MERCOSUR	1992 IBRD Guidelines on the Treatment of Foreign Direct Investment
	1994 APEC Non-Binding Investment Principles	1994 General Agreement on Trade in Services, Multilateral Agreement on Trade in Goods, Agreement on Trade-Related Investment Measures, Agreement on Trade-Related Aspects of Intellectual Property Right
	1994 Energy Charter Treaty	

	1995 Pacific Basin Charter on International Investment	

Source: Selected and compiled by this author from the UNCTAD-DTCI, (1996) Compendium of International Investment Agreements

The Influence of Economic Theory and Investment Liberalization

According to neo-liberalism, the market is the most efficient allocator of resources so it should be allowed to operate with as little regulatory interference as possible. This leads to a preference for an open international economy with minimum state or international regulation[28]. Foreign investment is regarded as an important source of capital, and FDI also brings to the host countries advanced technology, managerial skills, employment, and the improvement of production methods as well as competition that help to up-grade local firms' operations. This perspective entails an open market economy, even though firms still could be subject to some restrictions (on the grounds of security, public order, health and other sensitive issues).

Beyond Neo-liberalism, a country adopting Orthodox economic perspective argues that markets can become imperfect allocators of resources because they are distorted by the costs of technology and the costs associated with the distribution of resources and products. Therefore such distortions must be eradicated by selective public sector interventions in the economy. For example a large firm due to its size and technological capability can monopolise and distort product markets and undermine consumer choice through advertising and selling strategies, reinforcing its dominant position in the market. This requires selective and flexible state intervention/control to minimise market failures caused by such distortion. This may result in national laws requiring indigenous involvement in the ownership and control of local subsidiaries of foreign corporations, as well as for disclosure, accountability, and worker participation in TNCs. If state control is ineffective, measures of supranational control through regional and international organisation may be required.[29] For example the OECD Guidelines on Multinational Enterprises of 1976 were the product of negotiation between the OECD member governments and the Trade Union and Business Advisory Committees of OECD. This approach leads to the idea of "Corporatism", where the interests of capital, labour, and society interact through public bodies, composed of governmental, business and labour interests dedicated to national economic planning.

More restrictive measures are employed in Marxist perspectives, which emphasises the exploitation of labour by capital, and the global division of labour leading to imperialism, entailing the monopolistic control of markets. This emphasises the role of "core country" and "centre-periphery relations". The core country is considered to control peripheral economies through the function of financing and controlling investments, and through the managerial

[28] Muchlinski (1995: 93).
[29] See Vernon, R. (1973) *Sovereignty at Bay.* Peligan. pp.260-71 cited in Muchlinski (1995:94).

hierarchy i.e. through the hierarchical division of authority in the firm between the highest levels of management in the home country of the parent, intermediate management in regional sub-centres and the lowest levels of management in the branch plants located in the peripheral countries[30]. The extreme Marxist theory of the imperialist economy advocates withdrawal from the capitalist global economy in order to avoid interference and distortions due to flows of capital from outside.

The nationalist theory is concerned with national independence, self-determination and cultural autonomy. Consequently states may impose controls on TNCs that are not justifiable in economic terms and may even be damaging to the national economy. States may purchase or nationalise foreign owned assets, or by imposition of tariffs, taxes, subsidies or other instruments make foreign ownership of property less attractive, in order to have certain kind of production controlled by nationals rather than foreigners. Moreover, nationalism is concerned with the redistribution of national wealth, to increase the availability of high-income jobs for nationals or local ethnic groups. This strategy is espoused for example by Malaysia, where the government reserves a high ratio for "Bumiptra", the ethnic Malays, in ownership, employment, and management in the business sector, as well as of other benefits in society. Divestment, control over the main means of production, and exclusion of foreign investment from sensitive sectors are also measures applied to foreign investors by nationalist regimes.

The environmental perspective influences a country to take precautions in relation to the effects of international investment operations in the host country, to ensure adequate environmental protection. The principal regulatory concern that has been raised in this context leads to the development of corporate group liability for damage caused by environmental hazards under the control of TNCs[31]. Also this perspective encourages improved disclosure on environmental matters, and better compensation in the case of accidents. The host developing countries also require TNCs to comply with their national environment laws, as a prerequisite for obtaining investment incentives. This seems to develop a new general framework for the evolution of business activities and to influence the FDI policy of host countries.

Finally, global consumerism[32] favours the social and cultural effects of the expansion of global firms producing goods for private consumption. The influences of the increasingly global culture on life styles and consumption patterns that are distinct from the traditional and indigenous life styles and patterns in host countries, are fuelled by the role of transnational media and advertising corporations as the creators of images changing consumer tastes to fit with the products and services offered by TNCs. This perspective affects nation states' FDI policy in two distinctive ways. On the one hand, a country may be aware of this negative impact of the changing life style and consumption patterns threatened by foreign cultural

[30] See discussion in detail in Brewer, A. (1990).
[31] The matter highlighted by the accidents at Seveso and Bhopal. See Cassels, James (1993), also see Baxi, Upendra (1986), and Baxi, Upendra and Thomas, Paul (1986).
[32] See Sklair, L. (1991).

domination so that it may see fit to protect its cultural industries or even prohibit foreign ownership or screen out the entry of such investment. On the other hand, as consumer choices move towards the acquisition of globally marketed products, countries may encourage the continued development of global consumerism. In this way, a country may also support long term and stable employment. In this perspective, employment stability is considered to result from economic growth and increased consumption. Global consumerism, in contrast to environmentalism, encourages competition, free markets, and consumption. States may help enhance a high standard of employment and job creation to maintain high purchasing power, and welcome foreign investment.

From this overview and discussion of the interaction of legal and economic factors in FDI policy as well as global economic changes, and the growth of TNC networks and international integrated production system, we can clearly see that developing countries, which have heavily relied on trade and investment flows into the countries must integrate themselves into the global economy. The shift from state-centred policies to an emphasis on the role of non-state players implies that developing countries may need to adjust their FDI policy accordingly. Therefore the crucial FDI policy for developing countries is how to facilitate the integration of the country into the global economy and to encourage the role of non-state players i.e. the TNCs.

The Rationale for Bilateral Investment Treaties: the Alternative to Multilaterally Acceptable Norms and Global Rules on Investment

Since there is no global or central organisation regulating international investment, and because of the absence of a consensus to create multilaterally acceptable norms (Carty, 1991: 66), problems arising from these inadequacies were left to be solved by the parties concerned, which usually means between the host and the home states, and the transnational corporations. Actually they are the main players in the field of international investment. Thus they have mainly resorted to bilateral investment agreements, as these have enabled them to reach solutions in a flexible way and avoiding severe conflicts between them especially where host countries are developing states. In particular, as discussed in the previous section, they have embodied a compromise solution to the problem of compensation for expropriation[33]. The failure in bringing about a comprehensive code or multilateral investment agreement is largely because of the different ideology and conflict of interest between states. Thus the emergence of bilateral investment treaties has been regarded as a specific legal instrument seeking to solve the specific problem of international investment

[33] The complexity of these issues brought about the hot debate on the emerging Resolution of the UN GA of the Permanent Sovereignty over Natural Resources and the New International Economic Order through out 1960s and 1970s.

relations, and therefore "creating an effective *lex specialis* between the parties" (Muchlinski, 1995: 639, also see Sornarajah, 1994: 231-76; Vagts, 1990: 112; Salacuse, 1990: 655).

The modern bilateral investment treaties are a rather recent phenomenon on the international investment scene as the first one was signed between the Federal Republic of Germany and Pakistan on 25th November, 1959 (Dolzer & Stevens, 1995: 1; Muchlinski, 1995: 618). However, before the emergence of BITs, treaties of friendship, commerce and navigation were concluded as the instruments for conducting bilateral economic relations between states[34]. The FCN agreements concluded among developed countries were quite successful but it proved difficult to conclude FCN agreements with developing countries, because the FCNs contained a wide variety of matters, including the right to enter, access to local courts, enforceability of arbitral awards, the right to engage technical experts, questions concerning the lease of land, tax issues, customs treatment of commercial travelers, treatment of products and consultations regarding restrictive business practices (Dolzer & Stevens, 1995; 10). This is because these agreements were primarily concerned not only with facilitating trade but related to foreign property, so the wide scope of the agreement had been thought to cover all issues concerned. Developed countries were concerned that the broad spectrum of close political, economic and cultural co-operation that was envisaged by FCNs was probably more appropriate for agreements between states of comparable economic stature. Furthermore, key features of traditional FCNs, like the unrestricted right to entry and the unqualified right of national treatment, were incompatible with the post-colonial political realities (Aksen, 1981: 357), reflected in various U.N Resolutions[35]. Thus the FCNs were viewed as an inappropriate instrument for bilateral economic co-operation and the BIT emerged as the preferred type of agreement for foreign investment protection.

Indeed, bilateral investment treaties reflected well that firstly, there has been a need for rapid development of the law in the area of international investment but such development was not forthcoming[36] because of the conflicts that were inherent in this area. Hence, states had to resort to the second best solution by making bilateral investment treaties to ensure that, at least, there would be some rules relating to foreign investment. Secondly, BITs were the result of state bargaining so it allowed some divergence in terms and definitions in BITs as well as in the practices of even a single state. Thirdly, the surge of BITs was the result of economic and political conditions. This can be seen from the period when BITs were concluded reflecting the surge of BIT where capital is needed.

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[34] The FCNs had been concluded since the 18th century. The first FCN treaty was signed between France and the United States in 1778.

[35] See U.N GA. Res. 1803 (XVII) (1962) and U.N GA. Res. 2158 (XXI) on Permanent Sovereignty over National Resources especially the U.N GA. Res. 3201 (S-VI), Declaration on the Establishment on a New International Economic Order.

[36]. See Barcelona Traction Light & Power Company Case ICJ Rep. (1970) p.46-7. The International Court of Justice in this case stated that "Considering the important development of the last half-century, the growth of foreign investment and the expansion of international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of the law has not gone further and that no generally accepted rules in the matter have crystallised on the international plane", cited in UNCTAD, 1998b: 2.

By the end of 1996, BITs were increased to 1,332 (UNCTAD, 1998b: 10), two-thirds of them were concluded in the 1990s alone (UNCTAD, 1996b: 147). This happened concurrently with the changes in economic and political systems. When host developing countries and new open economies coming into the field compete fiercely with each other for FDI, they have to be willing to conclude BITs with all capital-exporting countries, both developed and developing countries, to ensure the confidence of foreign investors through their guarantee of investment protection. China, for example, concluded 57 treaties within 10 years, of which 32 were entered into in the 1990s (UNCTAD, 1996b).

Even though the number of BITs has been increasing and they have a basic similarity in their structure, their contents are widely divergent. They indicate the adoption of a variety of standards depending on the negotiating positions of the different states. Often the same state will accept varying standards on areas such as compensation for expropriation, the repatriation of profits and the arbitration of disputes that arise.

Generally, BITs begin with a prefatory statement including the aims of the treaty, i.e. to encourage and protect investment flows occurring between the two states. The four major aspects of BITs are then indicated. These are:

1) Scope of Application: the definition and identification of the types of property that are protected and the nature of the link or nationality to one of the parties that entitles the foreign investor to the protection of the treaty;
2) Admission and Treatment: the standard of treatment to be accorded to the foreign investor, the right to repatriation of profit etc.;
3) Expropriation and Compensation: the standard of compensation in the event of a take-over of the foreign investor's property;
4) Settlement of Disputes: the procedure for settlement by arbitration of disputes arising from the investment.

These are standard contents in all bilateral investment treaties. But there are variations in the statements of the rules to be applied between the parties. The following is a discussion of the wide divergence of BITs in certain aspects.

The Statement of the Purpose of the Treaty

Every bilateral investment treaty states the motives, objectives and circumstances through which a treaty can be seen in its proper perspective, specifically the reciprocal encouragement and protection of investment. The standard clauses are: the general desire of the parties to intensify and to develop their economic relations; the need to create conditions which are favourable for investments of nationals of either state in the territory of the other state, and the conviction that the protection of such investment will lead to the stimulation of private initiative and to the promotion of the prosperity of both states concerned (Dolzer & Stevens, 1995: 20-1). However, variations from the standard pattern have existed in various treaties. Some treaties may include a reference to reciprocal protection (BIT between the

Czech Republic and Hungary, 1993)[37] or to co-operation between private enterprises of the two countries (BIT between Belgium-Luxembourg and Bangladesh, 1981)[38]. Others have included a reference to the transfer of capital and technology (BIT between France and Hungary)[39]. The investment treaty between Switzerland and Turkey provided reference to international law or to the principles of international law as a basis for economic co-operation. A number of treaties concluded by Central and Eastern European countries have made reference to the Final Act of the Helsinki Conference to include obligations in the field of Human Rights. German treaties have frequently incorporated a reference to the benefits that may flow from the "contractual protection". But typical U.S treaties contain the commitment of the parties to fair and equitable treatment of investments[40]. These variations reflect the background of the relevant political, economic, historical and cultural consideration of each party to the treaty.

The reciprocal encouragement and protection of investment provided in the preamble of the bilateral investment agreement have been regarded in past decades as an agreement between unequal partners[41], since they were usually made between a capital-exporting developed country and a capital-importing developing country. This was because even though the treaty contemplates a two-way flow of investment between the state parties to the treaty, it is only a one-way flow really occurs given the disparities of wealth and technology between the two parties. Since the rationale for the treaty is the promise of protection for the foreign investment received in that host state, and only developing countries surrender protection rights to investors from the other party, then they entailed the erosion of sovereignty by one party without a corresponding erosion in the other. This perception has declined over time when the developing countries have also become capital-exporting countries.

Definition of Investment

In the early days, the idea that the intangible property of an alien is incapable of protection by international law existed, as the early stage of foreign investments were mainly made in the mineral resource sector and plantations as well as in other tangible property. So due to the nature of investment in those day, an alien's property mostly involved tangible property. The creation of intangible rights was rare and presumably was dependent on the laws of the host state. Thus rights to intellectual property such as patents, copyright and know-how were vested in a person only to the extent that the local law recognised those

[37] See BIT between the Czech Republic and Hungary, 1993 in ICSID, Compilation of Investment Promotion and Protection Treaties. Release 95-4, issue November 1995, Oceana Publications, Inc.(now it is updated as of November 1999)

[38] See BIT between Belgium-Luxembourg and Bangladesh, 1981, Ibid.
[39] See BIT between France and Hungary, 1986, ibid.
[40] For detailed survey, see Dolzer & Stevens, 1995: 20-25.
[41] Salacuse (1990: 662) observes that "A BIT purports to create a symmetrical legal relationship between the two states, for it provides that either party may invest under the same conditions in the territory of the other. In reality, an asymmetry exists between the parties to the BITs since one state will be the source and the other the recipient of any investment flows between the two countries".

rights. The host state had absolute control over intangible property as such rights were dependent on the law of the host state for their recognition. Also rights of protection for shareholders were seldom referred to, as the investors were likely to be individuals. Moreover, literary, artistic and industrial property was excluded (Verdross, 1931: 364).

But it became increasingly recognised that protection of intangible rights was essential and central to investment protection[42]. This began with concession agreements, which created contractual rights that were intangible. So a number of early treaties entered into following that period defined the term 'investment' in a broad general way, such as "the term 'investment' shall comprise all categories of assets including all categories of rights and interest"[43].

Modern forms of foreign investment treaty involve the transfer of intangible rights; licensing agreements, management contracts and consultancy contracts also have intangible assets as their subject matter. So the protection of foreign investment increasingly meant not only the protection of the physical assets of the investors but also the intangible assets that the investors took into the venture, which often were as valuable as or more valuable than the physical assets themselves. Thus the definition of investment in modern BITs now tends to be as broad as possible, using a more elaborate formula, in order to dispel any lingering doubts that may exist from the early idea that intangible property is not property that is protected by international law.

The general standard formula of the definition of investment in recent BITs has included traditional property rights, rights in companies, monetary claims and titles to performance, copyrights and industrial property rights, as well as concessions and similar rights.

For instance, the term 'investment' defined in typical English BITs include:

- movable and immovable property and property right such as mortgages, liens and pledges;
- shares, stocks and debentures in companies and other interests in companies;
- claims to money or to any performance under contracts having a finance value ;
- intellectual property rights and goodwill, technical processes and know-how;
- business concessions including concessions relating to natural resources ("business concessions conferred by law or under contract, including concession to search for, cultivate, extract or exploit natural resources" is the term in more recent BITs)[44].

[42] It had begun recognised the intangible right since 1960s such as the dispute in the Carl Zeiss Stiftung Cases which litigated in England and elsewhere concerned trademarks. See Appeal Case (1967) 1. p. 853.
[43] See Dolzer & Stevens, 1995: 26. For example, they cited BIT between Germany and Sri-Lanka, at Art. 8 (1).
[44] For instance, BIT between UK and Indonesia, Art. 1. Also see BITs between UK and individual ASEAN countries.

Most European countries have also adopted these five groups of specific rights formula in concluding their BITs.

The American model BIT contains the above five categories and include "licences and permits issued pursuant to law, including those issued for manufacture and sale of products", and "any right conferred by law or contract, including rights to search for or utilise natural resources, and rights to manufacture, use and sell products". The American model seeks to secure such achieved rights, which are granted by host countries under administrative law at the time the investment took place so that they could not later be withdrawn by the administrative agency, as these rights entail permission to conduct a certain activity in the host state. The whole course of the foreign investment may depend on the existence of such public law rights. The investment would not be valuable if the right to repatriate profits initially granted is later withdrawn. So the extension of the definition of property to include these public law rights acquired under the host state's law is to ensure the security of foreign investment in those countries. Also copyrights and industrial property rights defined in the US BITs are considerably more elaborate. They spell out these rights as follows:

- intellectual property which includes, *inter alia*, rights relating to :
- literary and artistic works, including sound recording;
- inventions in all fields of human endeavour;
- industrial designs; semiconductor mask works;
- trade secrets, know-how, and confidential business information; and
- trademarks, service marks, and trade names[45].

However, though 'investment' has been defined as widely as possible, many treaties confine the term investment only to investment approved by the state parties to the treaty. Some states require approval for all incoming foreign investment, others maintain an open door for all foreign investment but give special privileges only to investment that has secured approval. The approval is usually given only to such investments that are considered particularly beneficial to the host country and are subject to the satisfaction of conditions that might be imposed.

The great variety of and the more and more elaborate definitions in BITs reflect the fact that BITs cannot cope with rapid change in the world economy, the changing features of international investment, the integrated production processes and transactions of TNCs across the world, as well as the dynamic technology in today's world.

Criteria for Determining Nationality

BITs generally define the persons who may make an investment, and who may as a consequence enjoy the protection laid down in the treaty's substantive provisions. While some BITs use the term "investors", some treaties refer to "nationals", and in doing so draw a

[45] For example, see US-Ecuador BIT (1993), at Art. I (1) (a) (iv) and other recent U.S BITs.

distinction between (a) individuals or natural persons and (b) companies and other juridical entities. These two categories of potential beneficiaries present distinct problems and will therefore be treated separately. Generally, states are free to choose the criteria that will determine an individual's nationality under BIT. Most BITs usually define "nationals" by reference to the parties' domestic laws on citizenship. The determination of juridical person's national is more complex with various approaches. Since the regulation of foreign investment mainly concerns juridical person, I will confine my discussion to corporate nationality.

BITs have essentially relied on three basic criteria to determine the nationality of a company or juridical person, namely:

1) the concept of incorporation or constitution, according to which a company is deemed to be attached to the legal order under which it was incorporated, irrespective of the place and seat of its economic activities. This approach is preferred in the Anglo-American legal system. The rationale for this criterion is consistent with traditional international law[46];

2) the concept of the seat (siege social), according to which the actual management of a company determines its nationality. This concept has generally been followed in German BIT practice;

3) the concept of control, according to which nationality is determined on the basis of the nationality of the shareholders that own or control the company. This concept has been included in most of the recent Swiss treaties.

The rules governing the attachment of a juridical entity to a state present some difficulty (Metzger, 1971; Reismann, 1971) [47], and a decision to rely on any one of the criteria may lead to different results. For instance, while the requirement of incorporation obviously leads to certainty, it may be outweighed by the fact that the place of incorporation may be no more than a formal or artificial link. Thus investors from third countries might stand to benefit from the treaty simply by incorporating their venture under the laws of a BIT Contracting Party. On the other hand, greater uncertainty may result from relying on the concepts of seat and control, though these criteria may be better suited to establish the true links of a particular company to a state. Some BITs have combined two of the above criteria in order to restrict the application of the treaty to companies that have indeed established appropriate ties with the home country. Other BITs refer to these criteria as possible alternatives, thereby broadening the scope of application of the treaty (Dolzer & Stevens, 1995: 36). These BITs specify that a company incorporated in one contracting party could be protected by the other party provided the seat of control of the company is located in the

[46]. Because the corporation is a creature of domestic law and depends for its existence on domestic law. It can be destroyed at will by the domestic system that created it. For this reason, international law did not interfere with corporate personality in any significant manner. It was also logical that since the creation of the corporation depended on the will of the state as expressed in its domestic law, the corporation should have the nationality of the state in which it was created.

[47]. See Metzger (1971) *Nationality of Corporate Investment under Investment Guarantee Schemes - The Relevance of Barcelona Traction.* 65 AJIL 532; and Reismann (1971) *Nationality and Diplomatic Protection of Companies and Their Shareholders.* Journal of World Trade Law 719.

other contracting party or where there is control or substantial interests in the company by the nationals of the other party. In this manner, the treaty would ensure protection for subsidiaries of multinational corporations that are incorporated in a host state party, and also in the situation where the multinational corporation invests through the formation of a joint venture in the host state party. The protection of joint venture interests will still remain a problem in many states, as the foreign party may be a minority shareholder who will not have control over the joint venture corporation. If the minority foreign shareholder's shares are affected through the procedure prescribed in the internal constituent documents of the joint venture company in accordance with the law of the host state, there will be little by way of diplomatic protection that can be given (Sornarajah, 1994).

Though some of the BITs seek to grapple with the problem raised by corporate nationality, there is no consistency in the solutions adopted by them to give rise to a uniform principle. One can see a wide array of solutions in different treaties. The practices of even single states vary. For instance, the Singapore-United Kingdom Treaty[48] defines a British company as a company incorporated in Britain, whereas the Singapore-Germany Treaty[49] defines a German company as one "having its seat in the Federal Republic of Germany". British practice is also inconsistent on this point. Whereas the incorporation theory is preferred in the treaty with Singapore, the United Kingdom-Philippines Treaty [50]opts for a theory of control when it defines a protected company as one "actually doing business under the laws in force in any part of the territory of that contracting party wherein place of effective management is situate" (Art. 1 of the BIT between the United Kingdom and the Philippines).

Indeed, the definition of a corporate nationality in bilateral investment treaties goes against more traditional notions in international law, which lags behind the development of economic reality. The general rule relating to the diplomatic protection of corporations making investments in foreign countries was stated in the *Barcelona Traction* case[51]. According to that case, a corporation has the nationality of the state in which it is incorporated and only the latter state has the right of diplomatic intervention on behalf of the corporation[52]. The court referred to the growth of multinational corporations within the international economy and expressed surprise that there had been little development towards securing greater protection for investment by multinational enterprises.

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[48] See BIT between Singapore and The United Kingdom in ICSID, Compilation of Investment Promotion and Protection Treaties. Release 95-4, issue November 1995, Oceana Publications, Inc. (now it is updated as of November 1999)

[49] See BIT between Singapore and Germany, Compilation of Investment Promotion and Protection Treaties. Release 95-4, issue November 1995, Oceana Publications, Inc. (now it is updated as of November 1999)

[50] See BIT between the United Kingdom and the Philippines, ibid.

[51]. I.C.J. Report (1970), also see *Asian Agricultural Products Ltd. (A.A.P.L.) v. Sri Lanka (1992) 17 Yearbook of Commercial Arbitration* 106 at para. 90. Also see the separate judgement of Oda J. in the Elsi Case.

[52]. In this case, the court denied that Belgium had *locus standi* to maintain an action against Spain to protect the interest of Belgian shareholders of Canadian company whose investment in Spain had been affected by Spanish judicial and administrative measures.

Standard of Treatment

Treatment is a broad term, which in the context of BITs refers to the legal regime that applies to investments once they have been admitted by the host state[53]. This is an issue of considerable disagreement between states on the question of what treatments are generally accepted. In the past, as discussed above, there were two main principles asserted by states. One is the minimum standard of treatment, which was invoked by capital-exporting countries. The recognition of a minimum standard of treatment permits international scrutiny of the treatment of the foreign investor by the host state. The other is the national standard of treatment espoused by developing countries, especially Latin American countries. The principle of the national standard of treatment under "Calvo Doctrine" was that the protection for the foreign investor should not be better than that given to the domestic investor[54]. The developed countries rejected this principle, as the treatment by some countries was lower than the minimum standard expected by the capital-exporting countries.

In modern times, however, national treatment may have its advantages as states reserve many of their economic sectors and privileges to nationals. Therefore the giving of national treatment, as a minimum standard, may confer advantages on foreign investors as it will enable them to have the privileges enjoyed by nationals. For this reason, there is a tendency among the developed countries to include a new formulation of national treatment, as "no less favourable" than the treatment given to nationals.

As there have been differences in the standards of treatment of foreign investment, states have sought to agree on the standard of treatment that they would accord to the investment of their nationals in bilateral investment treaties. There are four different devices used in BITs. Firstly is "fair and equitable treatment" principle to be accorded to the nationals of the contracting parties. This phase is vague and open to different interpretations[55]. It permits treatment that reaches the standard of fairness and requires that all foreign investors be treated equally.

Second is "full protection and security". This phrase is also difficult to give an exact meaning because it stems from a lack of clarity, as in fact, the origin of the phrase came from the FCN treaties which were less detailed than the modern BIT. A number of BITs have followed the OECD Draft Convention and have combined the principle of full protection and security with the principle of fair and equitable treatment by providing that full security and protection shall be enjoyed "in a manner consistent with international law".

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[53] However, as will be discussed below, some states have recently re-formulated the national treatment standard to apply also to admission, i.e. pre-entry NT.

[54] See Muchlinski (1999: 626) also see UNCTAD. (1999) *National Treatment: UNCTAD Series on issues in International Investment Agreements.* New York and Geneva: United Nations.

[55]. Mann (1981: 242), on the other hand, argues that the term "fair and equitable treatment" envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal would not be concerned with minimum, maximum or average standard. It will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely to be material. The terms are to be understood and applied independently and autonomously.

Third is national treatment. This may be the optimal position that could be obtained. It means that the host state is obliged to accord foreign investor treatment no less favourable than that enjoyed by its own nationals. National treatment is, however, rarely accorded without limitations and many treaties provided that such treatment will apply only where the foreign and the domestic investor find themselves in "identical" or "similar" situations or "in like situation". Alternatively, the provision may refer to "similar enterprises" "similar investments" or even investors "with similar activities". Since the situations of the foreign and domestic investors are seldom identical, the application of the provision may well be a difficult task. It is even worse when the treaties did not seek to determine what in fact constitutes "similar" circumstances, activities, or enterprises.

In the earlier period, developing countries have traditionally been reluctant to extend national treatment to foreign investors. This attitude was clearly reflected in the course of discussions on the UN Code of Conduct on Transnational Corporations where there was concern that an unqualified obligation to extend national treatment would curtail developing countries' ability to control their domestic economies (Asante, 1989; UNCTC, 1988b: 46).

Fourth is the Most-Favoured-Nation treatment (MFN) standard, which also came from the old FCN treaties. This principle enables the nationals of the parties to profit from favourable treatment that may given to nationals of a third state by either contracting party. In other words, the MFN standard seeks to assure investors of one home country treatment which is not less favourable than that which the host state accords to nationals and companies of any other country.

The majority of BITs combine the MFN and national treatment standards so that the nationals of either state may claim the more favourable standard of treatment. In several BITs the reference to national and MFN treatment is complemented by the phrase "whichever is more favourable"[56]. Some treaties combine these standards in one clause with other standards of treatment such as fair and equitable principle or full protection and security.

However, economic, political and legal circumstances may require the host country to limit the investors' right to national and MFN treatment. Such exception clauses may refer to a range of different qualifications, the broadest and most common of which is the denial of preferential treatment that results from the host states' membership of customs union or a regional organisation. This will be stated in the treaty itself. It cannot therefore be argued later that measures taken under these regional arrangements conferring privileges should be conferred upon foreign investors on the basis of the most favoured nation clauses.

Repatriation of Profit

The main objective of all foreign investment is to make profits and repatriate them to the home state. If repatriation of the profits is prevented by the host state this purpose of foreign investors would be frustrated. The protection of the right to repatriate profits becomes

[56]. This formula has been followed in US treaties and in some of the treaties concluded by the Netherlands.

an objective of the investment treaties. Many BITs contain absolute statements protecting the right of repatriation. This is unrealistic, as problems will arise when a contracting party has foreign exchange shortfalls necessitating currency control. However, many BITs address this problem and provide exceptional clauses according to the financial crisis of the contracting parties. Many of the British treaties provide that the right of repatriation of profits may be restricted "in exceptional economic or financial circumstances"[57]. The repatriation clause will usually include not only the profits that are made but also all other payments such as fees or other entitlements that are paid to the alien[58]. But if the property of the national is taken over and compensation is paid, there may be separate provision made for the repatriation of such compensation.

Nationalisation and Compensation

Nationalisation poses the greatest threat to foreign investment. Capital-exporting countries have sought to circumscribe the right of a state to nationalise foreign property by regarding at least certain types of taking of alien property as unlawful. Under international law a state has the right to nationalise foreign owned property provided certain conditions are met, namely that the taking of the investment is done for public purposes[59], in accordance with the law[60] and against compensation[61]. There is broad agreement that the right is subject to the payment of compensation. The treaties also seek to indicate that the provisions relating to expropriation apply not only to outright taking but also to "creeping expropriation", or the slow erosion of the alien's ownership rights through regulatory measures.

It is the issue of compensation, particularly the amount of payment, which is the most contentious and controversial. Capital-exporting states, particularly the United States, have steadfastly adhered to the standard of "prompt, adequate and effective compensation", the "Hull formula"[62], as the standard of compensation that has to be satisfied in the event of nationalisation. The standard would require, at the very least, the payment of the full value of

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[57]. For example, Singapore-United Kingdom Treaty (1982).

[58]. One problem with the right to repatriate relates to the fact that foreign investment often earns several times the capital that is invested. The net outflow from the host state is far greater than the initial inflow. When this situation eventuates, the host state will begin to have second thoughts about the unrestricted right of repatriation of profits but will be restricted by the bilateral investment treaty which imposes an obligation to permit repatriation. The treaty provision on repatriation is formulated in such a manner as not to permit the host country to resign from its obligation on this matter. This poses a potential for dispute between the treaty partners.

[59]. In the absence of an internationally agreed upon definition, the notion of what in fact constitutes public purpose will to a considerable extent rest with the state concerned and it is hardly conceivable that it can be reviewed or contested by another organ. See Sornarajah, 1986 & 1994; Dolzer & Stevens, 1995)

[60]. Nearly all BITs require that expropriations be effectuated under due process of law. In an international instrument, the requirement would suggest that the investor for example has the right to advance notification and a fair hearing before the expropriation take place; and that the decision be taken by an unbiased official and after the passage of a reasonable period of time.

[61]. The draft UN Code of Conduct on Transnational Corporations contains the following clause: It is acknowledged that States have the right to nationalise or expropriate the assets of a transnational corporation operating in their territories, and that adequate compensation is to be paid by the State concerned, in accordance with the applicable legal rules and principles.

[62]. In 1983, U.S. Secretary of State Hull declared in correspondence to the Government of Mexico that "under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose without provision for prompt, adequate and effective payment therefore".

the property that had been taken over. The developing countries have collectively articulated the standard of "appropriate compensation". They asserted that it would be a flexible standard that would permit a state to take into account factors such as the profits made by the foreign investor, the duration of the period during which profits were made and similar factors in assessing the compensation. Developing countries have also expressed the view that the tribunal of the host state should be the sole arbiters of the amount of compensation.

Given the existence of this conflict between states and the long-standing absence of agreement on this issue at the multilateral level, BITs have become the means by which parties could agree on the standard of compensation that is to be used between themselves. Therefore, BITs make law as between the parties but make no contribution to the formation of common norms of international law. BITs are not made with the aim of subscribing to the formulation of a uniform standard of compensation but rather are efforts by the parties to agree to a standard on which they would compensate in the event one of them nationalised the property of a national of the other.

One can see that there are wide divergences in bilateral investment treaties. But given the uncertainty that exists in international law on foreign investment, bilateral investment treaties will be looked upon as the best way of securing investment protection between parties. And this is the reason why BITs are currently accepted and increasingly concluded between states.

However, we can clearly see that BITs and the multilayered legal frameworks governing FDI still keep the host country's sovereignty to fully regulate and control FDI and maintain the screening process of the host country to admit the entry and establishment of FDI. This has been regarded as obstacles to the free mobility of FDI and there have been efforts and endeavor to fully liberalize international investment. Under the umbrella of the WTO, the Framework Agreement on Trade – Related Investment Measures (TRIMs) was elaborated and set up as the rule to prohibit the use of investment measures by the host country in order to facilitate the free flow of trade and investment. This is because investment measures have been regarded as trade - distorted measures. This initiative under the WTO reflects the further liberalization of investment and the need to remove or relax investment laws and regulations of the host country.

Currently, controls of FDI in developing countries, however, remained quite extensive and complex[63]. The policy instruments include the following:

- restrictions on entry and establishment;

[63] The analysis in this section is based on national investment laws of ASEAN countries, country study on investment regime of APEC member economies, and a study of the relevant national laws, also a study compiled in *Doing Business in Asia.* Published by CCH Asia Limited. The individual ASEAN country's laws in this loose-leaf are provided by (a) Indonesia: William A. Sullivan; (b) Malaysia: Yoong Nim Chor; (c) The Philippines: Sycip Salazar Hernandez & Gatmaitan; (d) Singapore: Drew & Napier; (e) Thailand: Baker & Mckenzie (Thailand)

- restrictions on the level of foreign ownership permitted;
- special treatment of foreign investors;
- operational restrictions such as local content requirements and minimum export levels;
- investment incentives such as tax concessions.

In addition, there are many other policies that influence FDI such as tariff and other trade barriers, the lack of competition rules and policy, and the degree and type of protection of intellectual property rights.

Table 2 summarises the regulations of FDI in developing countries and shows the main characteristics of investment regulations of these countries, on which the analysis of developing countries' national investment laws is based.

Table 2

Summary of the Regulations of FDI in ASEAN Countries

Countries/Laws	Limitation of Ownership	Restriction on Land Ownership	Restricted Sector	Performance Requirements	Tax Incentives
Indonesia Law No. 1, 1967 Law No. 11,1979 Law No.6,1968 Law No.12, 1970 Govt regulation, Presidential Decrees, Ministerial Regulations, Decision, Decree of Investment Co-ordinating Board (ICB)	subject to negative lists (Law No.1 of 1967, Decree No. 54 of 1993, Foreign Investment Act 1994)	three types of land rights available (Presidential Decree No. 34 of 1992)	23 restricted sectors and 12 prohibited sectors, including retail and wholesale trade, radio and television broadcasting (Presidential Decree No. 54 of 1993, Foreign Investment Act 1994)	local content requirements and export performance requirements in various sectors (Presidential Decree No. 54, 1993, Decree of the Ministry of Industry No. 114/M/SK/1993, Decree of the Ministry of Finance No. 645/KMK 01/1993)	priority sectors, Pioneer Industries (Law No. 6, 1968, Act No. 12, 1970, Guidelines of the Capital Investment Co-ordinating Board
Malaysia The Promotion of	depending on proportion of production	No restriction	certain parts or components	local content requirements in motor vehicles,	Pioneer Status, depending on

Investment Act (PIA) of 1986, The Industrial Co-ordination Act (ICA) of 1975, revised in 1986, MITI Regulations, The Foreign Investment Committee Guidelines(FIC)	exported (ICA 1975, MITI regulations)	(except for some threats to environment)	industries (ICA 1975)	export requirement depending on level of foreign equity (ICA 1975, MITI regulations 1991)	local content linkages, value added, MTS ratio, export oriented manufacture, technology, R&D and HRD (The Promotion of Investment Act, 1986, Malaysian Income Tax Act, 1967 (MITA)
Philippines Foreign Investments Act of 1991 R.A. 7042 as amended by RA 8179	subject to negative lists (Foreign Investment Act of 1991, Second Regular Foreign Investment Negative List pursuant to executive order)	Lease right, up to 75 years, hold land subject to approval and conditions (the Investors' Lease Act of 1993, President Decree No. 1648)	retail trade, mass media, engineering, rice and corn production, defence related activities, small and medium-size domestic market enterprises, import and wholesale activities Foreign Investment Act of 1991, Nationalisation Laws and Other Requirements, Various Republic Acts (RA), Constitution))	local content requirement , export performance requirements and technology transfer requirements in certain sectors, including motor vehicles (the Car Development Program, Commercial Vehicle Development Program, the Motorcycle Development Program	Investment incentives Tax and Non-Tax incentives (The Omnibus Investments Code of 1987, RA 6810, BOI's Official Order No. 6 of 1993),Executive Order No. 470: Tariff f Reform of 1991)
Singapore Company Act, The Business Registration Act, Acts under administration of Economic Development Board	generally there is no restriction except in banks, air lines and shipping (Company Act, the Banking Act, Monetary Authority of Singapore Act)	No restriction	arms and ammunitions manufacture, electricity, gas, and water, newspaper publishing, airlines and shipping (the Control of Manufacturer Act, and the National Security Act, the Banking Act)	No performance requirements	Pioneer Status, Package of tax incentives (Economic Expansion Incentives Relief from Income Tax Act, Income Tax Act
Thailand Investment Promotion Act B.E. 2520 (1977)amended by the Investment	in restricted sectors or if less than 80% of output exported (permission of the Board of	Generally foreigners are not allow to own land unless promoted by the Board of	banking and finance, insurance, certain public utilities and military goods, agriculture, animal husbandry,	local content requirements in motor vehicles, pasteurised and skimmed milk, and various other manufacturing	Tax and Non-Tax Incentives (Investment Promotion Act, 1977, 1997,

Promotion Act (No. 2) B.E. 2534 (1997), the Alien Business Law of 1972	investment Promotion, permission of the Ministry of Commerce, Civil and Commercial Code, Investment Promotion Act	Investment (Land Code, the Condominium Act, the Investment Promotion Act, Petroleum Act of 197, and the Industrial Estate Authority of Thailand Act)	fishery (the Alien Business Law, 1972, Commercial Banking Act, 1962, Act on the Undertaking of Finance Business, Securities Business and Credit Foncier Business, 1979 and the Securities and Exchange Act, 1992, Life Insurance Act, 1992 and the Casualty Insurance Act, 1992, Thai vessel Act, 1971	industries, domestic sales and export requirements in certain sectors (the Factory Act(B.E. 2535), The Investment Promotion Act (B.E. 2520)	BOI announcement, BOI Guidelines: Criteria for granting Tax and Duty Privileges for promoted Projects, 1993, Revenue Code)

Source: Compiled by the author from national legislation.

Table 3

An Example of the US Bilateral Investment Agreement Model

Contracting Parties and date of agreement	**Scope of application**		**Admission and Treatment**	**Expropriation and Compensation**	**Disputes settlement**	**Other main points**
	Investor	**Investment**				
The US and Lithuania 14 January 1998	Nationals and Legal persons legally constituted under applicable laws and regulations of a party whether or not organised for pecuniary gain, or privately or governmentally owned or controlled.	Investment means every kind of investment in the territory of one party owned or controlled directly or indirectly by nationals or companies of the other party	**Admission** **Pre-entry and Post-entry** Most-favour-nation treatment or national treatment, whichever is the most favourable, except the agreed annex issues	**Expropriation and Compensation** Investment shall not be expropriated or nationalised either directly or indirectly through measures tantamount to expropriation or nationalisation except for a public purpose, in a non-discriminatory manner, upon	**Dispute settlement** (1) initially seek solution through consultation and negotiation (2) submit the dispute to the court or administrative tribunals of the party that is a party to the dispute or in accordance with the agreed	(1) MFN and National treatment will not extend to the other party because the other party accorded to any regional arrangement, free trade area, custom union or multilateral international agreement (2) the treaty shall not dero gate from laws, regulations

				payment of prompt, adequate and effective compensation	procedure (3) submit to the ICSID	and practice of either party; international obligation; obligations assumed by either party

Source: compiled from the BIT between the US and Lithuania by the author.

Table 4

Comparison of some Investment Agreements concluded between ASEAN countries and some European countries, and the ASEAN Agreement for the Promotion and Protection of Investments

Contracting Parties and date of agreement	**Scope of application**		**Admission and Treatment**	**Expropriation and Compensation**	**Disputes settlement**	**Other main points**
	Investors	**Investment**				
Indonesia and **Britain** 27 April 1976	On British side: British companies and nationals including citizen of UK, colonies and British subjects On Indonesia side: Indonesian companies and nationals	Only investment which has been granted admission in accordance with their foreign investment law, within the territory of contracting parties only	**Admission** **Pre - entry** subject to foreign investment law and regulations **Treatment** **post - entry** MFN treatment	**Expropriation** for a public purpose **Compensation** market value, without undue delay	Refer to ICSID	On the British side, there is territorial extension to cover such territories, for whose international relations the UK are responsible
Indonesia and **Norway** 26 November 1991 replaced the one signed on 24 November 1969	National or company of a contracting party who effected or is effecting investment in the territory of the other contracting party	Only investment granted admission in accordance with foreign investment laws of Indonesia and in accordance with laws and regulations of Norway , within the territory of contracting party only	**Admission** **Pre-entry** subject to foreign investment laws on Indonesian side and in accordance with laws and regulations on Norwegian side **Treatment**	**Expropriation** for public interest, non-discrimination **Compensation** market value, paid without delay, with interest at commercial rate	1.Amicably settled within 6 months if not A. Submit to the contracting party's court having jurisdiction B. refer to ICSID	Repatriation subject to and to the extent permitted by its laws and regulations

			Post-entry MFN			
Indonesia and **Belgium** 15 January 1970	Nationals and legal persons of the either contracting party	Only approved investment in accordance with the legislation and administration of contracting party, situated in the territory of the contracting parties only	**Admission** **Pre-entry** subject to its legislation but grant MFN treatment for admission **Treatment Post - entry** national treatment (similar investment), MFN treatment for the protection	**Expropriation** for public interest **Compensation** just compensation, actual price of the affected goods, MFN treatment	-Diplomatic channels within a six month period, if failed then submit to arbitral tribunal -Arbitration decision binding the parties	For the purpose of protecting Indonesian national economy, some facilities may only grant to Indonesian concerns
Malaysia and **Britain** 21 May 1981	On the British side : citizen of the UK and colonies, and any British subject and companies constituted under the law in force in the UK&northern Ireland On the Malaysian side : Malaysian nationals and companies	Investment made in the territory of either contracting party only, and must be an approved project under Malaysian laws, on the British side, investments made in accordance with its legislation	**Admission** **Pre-entry** subject to laws enforced in either contracting party **Treatment** **Post-entry** Most-favoured-nation treatment accorded fair and equitable treatment	**Expropriation** for a public purpose **Compensation** prompt, adequate and effective	Refer to ICSID	Exception from MFN treatment for the preference or privilege extend to custom union or free trade area by either party
Malaysia and **Germany** 22 December 1960	Nationals and companies lawfully constituted in accordance with its legislation of the that party	Investment admitted in accordance with their laws and regulations with in the territory of contracting party only, and on the Malaysian side, it must be an approved project in Malaysia	**Admission** **Pre-entry** subject to the approval process in Malaysia and in accordance with its legislation in Germany **Treatment** **Post-entry**	**Expropriation** for a public purpose **Compensation** prompt, adequate and effective compensation and freely transferable	1. Settle by the both governments 2. Arbitration and the arbitral decision is binding	Companies shall not include a branch(es) which has its seat or incorporated in the territory or by or under the laws of a third party

			MFN or National treatment			
Malaysia and Belgium-Luxembourg 22 November 1979	Nationals and companies constituted in accordance with its legislation of that parties	Investment made in the territory of either contracting party in accordance with their laws and regulations, and on Malaysian side, it must be an approved project in Malaysia	**Admission** **Pre-entry** subject to the approval process in Malaysia and in accordance with its legislation in Belgium-Luxembourg **Treatment** **Post-entry** MFN treatment	**Expropriation** for a public purpose and non-discrimination **Compensation** prompt, adequate, and effective, freely transferable	A. amicable settlement, if not B. submit to ICSID	Repatriation of return of investment and others is freely transferred but subject to its laws and regulations
Malaysia and Norway 6 November 1984	Nationals and companies lawfully constituted, having its seat or having predominating interest of that party	Investment made in the territory of either contracting party in accordance with its legislation. On Malaysian side, it must be an approved project	**Admission** **Pre-entry** subject to its right to exercise powers conferred by its laws, and screening process **Treatment** **Post-entry** MFN treatment	**Expropriation** for public interest, under due process, non-discrimination **Compensation** prompt, adequate and effective, which is freely transferable	Refer to ICSID	-Freely repatriation of return of investment but subject to its laws and regulations -MFN treatment will not extend to existing or future REIO
Malaysia and Finland 15 April 1985	Nationals and companies lawfully constituted in territory of that party or having predominating interest of that party	Investment made in accordance with its laws and regulations in the territory of either contracting party, and on Malaysian side it must be an approved project.	**Admission** **Pre-entry** subject to approval and in accordance with its legislation **Treatment** **Post-entry** MFN	**Expropriation** for a public purpose, non-discrimination and under due process of law **Compensation** prompt, adequate and effective,	Refer to ICSID	-Freely repatriation of return of investment but subject to its laws and regulations -MFN treatment will not extend to existing or

			treatment	amount to market value and freely transferable		future REIO
Malaysia and Netherlands 15 June 1971	Nationals and companies lawfully constituted in accordance with its legislation of that party. On the Netherlands side, including companies controlled directly or indirectly by its national or legal person.	On Malaysian side, approved project On the Netherlands side, investment under the relevant laws and regulations	**Admission** **Pre-entry** in accordance with their legislation, and approval process **Treatment** **Post-entry** national treatment	**Expropriation** for a public purpose, under due process of law and non-discrimination **Compensation** prompt, adequate and effective	1. local administrative and judicial remedies 2. refer to ICSID	Including shipping services
Philippines and Netherlands 27 February 1985	Nationals and companies of either party. Companies lawfully constituted in the territory of that contracting party, and actually doing business in the territory of that party wherein a place of effective management is situated, and directly or indirectly controlled by the national or company of that party	Investment brought into, derived from, or directly connected with investment brought into the territory of either contracting party in conformity with their laws and regulations	**Admission** **Pre-entry** fair and equitable treatment **Treatment** **Post-entry** MFN	**Expropriation** for public use, in the public interest or national defence **Compensation** just compensation at the market value, without undue delay and freely convertible currency	Refer to ICSID	-Freely transfer of investment but subject to the right to impose equitably and in good faith such measures to safeguard the integrity and independenc e of its currency **- Exception of MFN** contracting party will not extend privilege and preference to custom union, free trade area, which they are a member
Philippines and Germany	Nationals and companies of either party. Interpretation of company base on the concept of the seat	Investment made in the territory of either contracting party including the ones made prior to its enter into force of the	**Admission** **Pre-entry** accords to any similar investment in its territory, in accordance with laws and	**Expropriation** for the public benefit **Compensation** the equivalent of the investment	A. settle by the two contracting parties B. arbitration	**-Exception** MFN not included the privilege grant to the US nationals and

3 March 1964	(siege social)	agreement	regulations, need certificate of admission and with fair and equitable treatment **Treatment** **Post-entry** MFN treatment	affected, without delay		companies
Singapore and Britain 22 July 1975	British nationals include British, citizen of colonies, British subjects, and British protected person, and companies constituted under the British law. Singaporians and companies constituted the law enforced in Singapore	Investment specifically approved in writing by the contracting party in whose territory the investment have been made or will be made	**Admission** **Pre-entry** with fair and equitable treatment but subject to its right to exercise powers conferred by it laws to admit investment, **Treatment** **Post-entry** MFN and national treatment where applicable	**Appropriation** for public purpose **Compensation** prompt, adequate and effective compensation amount to the market value, made without delay and freely transferable	1. settled through diplomatic channel 2. arbitration	On British side, territorial extension covered any territory for whose international relations they are responsible but with the consent of the government of Singapore
Singapore and France 8 September 1975	Nationals and companies lawfully constituted under the law in force in that party. Company ,on French side, must has head office in France	Approved investment in writing in the territory of either contracting party	**Admission** **Pre-entry** fair and equitable treatment **Treatment** **Post-entry** MFN and national treatment	**Appropriation** for the public purpose, non-discrimination **Compensation** commercial value of the assets, without undue delay and free transferability	Refer to ICSID	**Exception** MFN treatment , privilege and preferential treatment accorded by virtue of regional arrangement by either contracting party will not extend to the other party
Singapore and Germany	Nationals and companies lawfully constituted in accordance with its legislation of	Only Investment made within the territory of either party.	**Admission** **Pre-entry** in accordance with its	**Appropriation** for the public benefit	1. amicable settled by the both governments	-Admission shall not be conditional for availing incentives for the

3 October 1973	either party. Definition of company in respect of Germany is having seat in the territory of Germany and lawfully incorporated.	On Singapore side, investment must be approved in writing by the government of Singapore, and on German side, investment made in accordance with its legislation.	legislation and administrative practice within the framework of the general economic policy **Treatment** **Post-entry** national treatment or at least MFN treatment where applicable	**Compensation** just and equitable with fair market value, without delay, freely transferable	2. arbitration	purpose of investment promotion. -Companies shall not include a branch(es) which has its seat or constituted in a third state.
Singapore and Netherlands 16 May 1972	Nationals and legal persons controlled directly or indirectly by nationals of that contracting party and constituted in accordance with the laws of the other contracting party.	On Singapore side, only the approved investment in writing made within the territory of Singapore. On the Netherlands side, all investment made by nationals of Singapore in the territory of Netherlands	**Admission** **Pre-entry** fair and equitable treatment within the framework of their respective legislation **Treatment** **Post-entry** national treatment and MFN treatment whichever is more favourable	**Appropriation** in the public interest and under due process of law non-discrimination Compensation just **Compensation** without undue delay, transferable in the currency of the country of the nationals affected	arbitration	including international merchant shipping services
Singapore and Belgium-Luxembourg 17 November 1978	Nationals and legal persons legally constituted under the laws in force in either contracting party	Investment approved in writing by the contracting party in whose territory the investment have been made or will be made subject to the laws and to the condition upon which such approval shall be granted	**Admission** **Pre-entry** accorded fair and equitable treatment in the territory of either contracting party subject to its right to exercise powers conferred by its laws or its administrative practice within the	**Appropriation** for public purpose, non-discrimination **Compensation** prompt, adequate and effective payment of compensation, represent market value and free transferability	1. Amicably settled by the both parties 2. refer to ICSID	MFN treatment not extend to the regional arrangements for custom, trade tariff or monetary matters which each contracting party is or will be a member

			framework of its general economic policy **Treatment** **Post-entry** MFN treatment			
Thailand and Germany 13 December 1961	Nationals and juristic persons of either contracting parties. the term juristic persons or companies mean entity having its seat in the territory of either party and lawfully existing consistent with legal provisions	only approved investment made in the territory of either contracting party in accordance with their legislation. Contracting party is free to decide in accordance to its policies and published plans	**Admission** **Pre-entry** admit the investment in accordance with the legislation and subject to approval process **Treatment** **Post-entry** national treatment and MFN treatment where applicable	**Appropriation** for the public benefit **Compensation** just compensation, freely transferable, without undue delay	1. settled by the both governments 2. arbitration	**Repatriation or transfer of benefit** Transfers from Thailand are subject to the regulation of the Bank of Thailand regarding stability and balance of payment, large amount of transfers shall be made in instalments
Thailand and Netherlands 6 June 1972	Nationals and legal persons constituted in accordance with the laws of either contracting party in the territory of that party including legal person which is controlled by a national of the other contracting party	subject to their legislation, companies, associations, other organisations of any kind or subsidiary bodies connected with economic life and all other nationals engaged in economic activities in its territory	**Admission** **Pre-entry** in accordance with its laws and requirements to admit investment from the other contracting party **Treatment** **Post-entry** national treatment and MFN treatment where applicable within the	**Appropriation** for the public benefit and under due process of law, non-discrimination **Compensation** just compensation in accordance with international law, without undue delay, in currency of the affected nationals. In case of transfer of large amount, it can be in	arbitration	territorial extension, on the Netherlands side, the agreement shall apply to the territory of the Kingdom in Europe, to Surinam and to the Netherlands Antilles

			limit of laws or legislation	instalments		

The ASEAN Agreement for the Promotion and Protection of Investments

Contracting Parties	**Scope of application**		**Admission and Treatment**	**Expropriation and Compensation**	**Disputes settlement**	**Other main points**
	Investor	**Investment**				
Brunei **Indonesia** **Malaysia** **Philippines** **Singapore** **Thailand** **Vietnam** 15 December 1987 amended on 12 September 1996	Nationals and legal persons incorporated or constituted under the laws in force in the territory of any contracting party wherein the place of effective management is situated	Only investment brought into, derived from or directly connected with investments brought into the territory of any contracting party by nationals or companies of any other contracting party and specifically approved investment in writing and registered in the territory of host country	**Admission** **Pre-entry** fair and equitable treatment subject to laws and regulations of host countries **Treatment** **Post-entry** MFN but any two or more of the contracting parties may negotiate to accord national treatment	**Appropriation** for public use or public purpose or public interest, under due process of law, on a non-discriminatory basis **Compensation** adequate compensation amount to market value, freely transferable in freely-usable currencies, without unreasonable delay	**Dispute among contracting parties** settled by 1. amicable settlement between the parties 2. submitted to AEM **Disputes between contracting parties and investors** settled by 1. settled amicably between the parties to the dispute 2. arbitration	Justification of company, incorporated under the laws in force in the territory of contracting party wherein the place of effective management is situated

Source: Compiled and compared by the author from ASEAN countries' bilateral investment agreements and the ASEAN Agreement for the Promotion and Protection of Investments

The Surge of the Current Bilateral Free Trade Agreement

In this section, I suggest a future trend of the global regulatory regimes in the foreign investment sphere and of the creation of normative rules to govern foreign investment activities. The discussion will focus on the factors facilitating the emergence of the new regime and will point to the problems of the current model of bilateral Free trade agreement (FTA) and investment regulation framework.

It is important to analyse the background and substance of the current model of bilateral free trade agreement, even though it is now entered into by many developing countries with their trading partners at bilateral level, it may be revised and incorporated into the WTO regime because of the strong support especially of the US, EU and Japan. Secondly I suggest the reform and revision of the FTA for coping with the problems that might be encountered by host countries, especially the weak countries. And finally I conclude that the global economy needs a new international investment regime and a proper global regulatory framework to regulate international investment. Developing countries may gain advantages from this revised framework agreement and it could be used as an investment instrument by developing countries

Background to the FTA[64]

Due to the delay in the World Trade Organization (WTO) negotiations both in the Uruguay and Doha rounds, more and more countries have entered into Regional Free Trade Agreements (RTAs) and Bilateral Free Trade Agreements (FTAs). In the Asian region, there have been movements for FTA negotiations of several countries, i.e. Singapore, Thailand, China, and India. There are two main reasons that the developed countries wish to enter FTAs with other countries:

First, there was a lack of certainty in negotiations of the Doha Round. Members separated into groups, making it difficult to reach final conclusions on various trade issues.

Second, almost if not all of the topics discussed in the Doha round were not related to the interests of developed countries as it was the development round. On the contrary, developed countries stood to lose a lot of if the Doha Round could be concluded successfully. Bilateral and regional negotiations would help them to convince its trade partners to change their policies and laws. This approach was more convenient for the developed countries than to continue with multilateral negotiations. Also, after other countries have made agreements under the framework of bilateral trade negotiations proposed by developed countries, it will be convenient to replace the trade regulations at the multilateral level with such legal framework. While the negotiations under

[64] Free Trade Agreement (FTA) in this article is specifically means the new model of the bilateral free trade agreement (investment chapter) introduced by developed countries after the collapse of the DOHA Round Trade negotiation. This new model of FTA is a new architecture of economic instrument in which the investment chapter is included. The standard texts of the investment chapter under the FTA provide a comprehensive set of multilateral rules for investment liberalization.

the WTO framework were facing problems, lobbying by interest groups was going on in the powerful countries. The governments of the developed countries were making more demands for liberalization of investment, trade in services, and intellectual property protection, areas where they will gain. At Doha, developing countries resisted these moves, and this put pressure on the United States to use the tactic of bilateral FTA negotiations instead. By using economic power, the United States has pressured several countries to agree to enter into FTAs, and is pursuing this approach all over the world.

With extensive success in concluding FTAs with developing countries in different regions, the United States is trying to stall trade negotiations under the WTO framework and trying to pressure more developing countries into entering bilateral FTAs on the premise that these countries are afraid of losing their U.S. markets to competitors.

Finally, when the United States succeeds in concluding FTAs with countries around the world, the trade framework under FTAs can be used to replace that the WTO framework. This is because the countries that previously resisted certain rules and regulations will have by then accepted the United States demands. They can no longer raise objections against similar regulations at the multilateral level. A global trade market without borders or obstacles from the public sector is desirable for capitalists, as this would mean a dominant position for borderless business interests over the state.

The declared rationale for the FTA was to free foreign investment and to protect foreign investors by asserting national treatment and the most-favoured-nation treatment so that foreign investors will be treated equally both among foreigners and between them and local investors. A comprehensive set of multilateral rules for investment provided for:

- national treatment, both before and after establishment;
- repatriation of profits, dividends, rents and the proceeds of liquidated investment;
- transparency of regulations;
- a mechanism of consultation to deal with complaints;
- investor – state dispute settlement mechanism
- peer view to promote rollback of remaining restrictions.

The FTA aimed to set standards for equal competitive opportunities and provided stable and consistent treatment of FDI across all sectors.

However, these objectives of the FTA that sounded good may turn out to be poisonous as the FTA had many gaps and loopholes to be corrected. Especially, the FTA would have encountered problems if it were extended to developing countries. Now I turn to discuss the content of the FTA and its implications.

The Content of FTA and its Implications

Definition of Investment and Investors

FTA defined investment very broadly to include any kind of property or contractual right to assets or money, owned directly or indirectly by the investor[65]. This would include, for example, claims to intellectual property, financial derivatives, and possibly real estate. Investors[66] covered by FTA were nationals or residents of member states, or any legal entities as companies formed under their laws. Assets would be protected if owned or controlled by such investors whether directly or indirectly owned. The inclusion of indirectly owned assets would cover capital routed through a company incorporated in a tax haven or an offshore financial centre, even one with lax regulation and strong secrecy. Thus, for instance, FTA would protect speculation in financial derivatives by hedge funds incorporated in tax havens, like the Bahamas, if its shareholders are residents of an FTA parties.

Regarding investors' rights, the FTA strongly protected such rights in legally binding form, backed by direct access to international arbitration. Many considered that this would bring international law into the service of the powerful and economically strong, while the poor and economically weak were entirely neglected. It failed to balance the granting of rights with any acknowledgement of responsibilities for social improvement, human rights or the protection of the natural environment.

Dispute Settlement Mechanism

FTA not only granted the rights for state to state arbitration of disputes but also for the corporations to bring claims against state governments over any breach of MAI provisions which caused loss or damage to the investors or an investment. However, there was no corresponding right provided for the governments, communities, or citizens to counter-claim for damages caused by the investor. In effect this gives the investor a status not just equal but superior to the governments and the people they are supposed to represent. National laws and regulation as well as economic policy legally and validly established will be overridden by the rights created by the FTA.

National Foreign Investment Laws and Regulations

If FTA had been agreed, it would have removed virtually all remaining national policy tools for regulating foreign investment. Obviously, this would restrict the ability of governments to regulate

[65] Art. II scope and application, sub 2 investment means: (i) an enterprise (being a legal person or any other entity constituted or organised under the applicable law of the Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation); (ii) shares, stocks or other forms of equity participation in an enterprise, and right derives therefrom; (iii) bonds, debenture, loans and other form of debt, and rights derived therefrom; (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; (v) claims to money and claims to performance; (vi) intellectual property right; (vii) rights conferred pursuant to law or contract such as concession, licenses, authorisations, and permits; (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

[66] . Investor means: (i) a natural person having the nationality of, or who is permanently residing in, a Contracting Party in accordance with it applicable law; or (ii) a legal person or any other entity constituted or organised under the applicable law of a Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, joint venture, association or organisation.

foreign investment for the common good in the same way as before, mainly geared towards supporting national economic policy and development plans as well as focusing on the development of key areas, both geographical and of business sectors. Moreover, unlike the GATT, FTA does not contain any general exceptions from FTA rules[67] (general exceptions would exclude specific kinds of government measures, which in the FTA were mainly limited to national security and perhaps public order)[68]. Instead, the FTA allowed only country specific exceptions, which required contracting parties wishing to preserve their sovereignty to regulate specific area of laws to identify any such measures that deviate from the FTA's NT and MFN obligation. These exemptions must be negotiated and agreed with the other contracting parties prior to signature or accession. Country specific exceptions are subject to "standstill"[69]. Therefore FTA did not provide an effective "exceptions clause" for national laws to protect matters such as human rights and human or animal health and the environment[70].

This is a very important issue for developing countries as they are weak *vis-à-vis* powerful TNCs[71]. Their ability to impose control is vital to prevent TNCs expropriating excessive economic benefits from investments in these countries and to help them compete on more balanced terms in highly unequal global markets. Thus the abrogation of host developing countries' sovereignty to regulate foreign investment could be a serious problem for their economies and particularly their people. Powerful TNCs can often escape from their responsibilities to victims of disasters from wrongful operations and evasion of domestic laws. The Bhopal case in India was an example[72].

In addition, the fierce competition for FDI among developing countries to attract inflow capital makes them relax laws and regulations to pamper foreign investors. It is even worse when this situation combines with corrupt officers who ignore the breach of laws and also the lax enforcement of laws and regulations[73]. All these factors could further exacerbate the poverty of developing countries.

National Treatment and Most-Favoured-Nation Treatment

The declared objective of FTA was to ensure that governments treat foreign-owned and nationally-owned investors equally. The national and MFN treatment principles would apply to the acquisition, establishment and operational activities of all investors. This sounded fair, however FTA went beyond these principles and provided elaborate legal provisions giving special treatment for

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[67] For example, in the case of Thailand, Art. 10 of the Aliens Business Act exempt s the application of Art. 5 to foreign investors who are persons covered and entitle to the preferences granted under the FTA. Art. 5 stipulated that "

[68] . See Picciotto, Sol and Mayne, Ruth (eds.) (1999: 95-96).

[69] . See Picciotto, Sol and Mayne, Ruth (eds.) (1999: 95, 128).

[70]. See Picciotto, Sol and Mayne, Ruth (eds.) (1999) chapter 4, 5, 6, especially see the discussion on the Country-Specific Exception and the Non-Lowering of Standard clause p, 76.

[71] . This is due to the high need of capital, and also their poverty may make them vulnerable to the problem such as corruption. Moreover, they might accept the "race to the bottom" policy to lax laws and regulations for attracting inflows of investment or in other words to pamper foreign investors.

[72]. Union Carbine Corporation, Gas Plant Disaster at Bhopal, India, in December 1984 (1987) 26 ILM 1008 US 2nd Circuit Court of Appeals. Also see Upendra, Baxi and Thomas, Paul (1986) *Mass Disasters and Multinational Liability: The BhopalCase.* London: Maxwell Ltd., and see Upendra, Baxi (1986) *Inconvenient Forum and Convenient Castastrophe: The Bhopal Case.* London: Maxwell.

[73] . Their poverty may make them vulnerable to problem such as corruption, which generally occurs in poor developing countries.

investors. They were to be given treatment "no less favourable than" nationals of the host state, this allowing the continuation of special privileges such as investment incentives and tax breaks.

A very sensitive issue was that the FTA would have eliminated most restrictions on foreign investors entering sensitive sectors. Almost all developing governments have restrictions on foreign ownership of key industries or sensitive sectors, or require approvals for such acquisitions, or insist that they be carried out as joint ventures with local investors or government bodies. And most FDIs are subject to screening measures to prevent entry of harmful FDI and to protect essential national interests, social values, culture and national heritage for the nation. These include preserving indigenous professions, fishing stocks, agriculture, natural resources, etc. that need to be carefully managed for the long term benefit of local people and not exploited for short term gain by TNCs. Even developed countries also protect their interests where they are considered to be harmed by FDI[74].

The FTA's provisions would have prevented governments from restricting foreign ownership, unless specific national exclusions were agreed by the other contracting parties. The FTA could also prevent countries from applying controls on foreign investors even if their activities conflict with a country's development objectives, or might be ecologically, socially or culturally damaging. Local health and environmental protection laws could also be questioned if they were considered discriminatory by foreign investors.

Performance Requirements

FTA prohibited performance requirements, especially imposed by developing countries, while some types of performance requirements implemented by developed countries would have been allowed, if made as a condition of an advantage given by the most government. Thus strong OECD members could be able to negotiate with foreign investors. In fact, performance requirements are designed to achieve minimum levels of local employment, investment, exports and proportion of locally-sourced materials, or to insist on joint ventures and technology transfer.

On the other hand, foreign investors are to be given the right to bring in essential employees, which can be broadly interpreted to cover "who is essential to the enterprise"[75]. Investors can also employ whomever, regardless of nationality. This will override national labour and immigration laws. Presently, developing countries have requirements that investors must employ a certain proportion of locals or train local people to take over from foreign specialists, but such requirements would have been threatened by this provision. This alarmed developing countries of the potential threats of unemployment problems, and undermining of transfer of technology, management expertise, technical operation skills and other advantages that host countries should obtain from FDI.

[74]. For example, the UK requested an exemption from the MAI on broadcast media and France sought protection from overseas investment, especially from Hollywood, in their film industries.

[75] . FTA also grants the rights to "key personnel" to bring their family into host state and "grant authorisation to work to their family" too.

Protection and Compensation

States would have been obliged to provide full and constant protection and security to foreign investors and also to provide compensation in the event of nationalisation or any kind of expropriation affecting property rights. The wide meaning of "measures having an equivalent effect" may cover taxation, and some environmental regulations. The right to compensation could override the state's right to tax. Compensation was to be at full market value plus interest in convertible currency even though the assets may have been bought at below market prices. Foreign investors have the right to freely transfer any derivatives from investment including dividends, interest, and all types of payments. Absolute freedom for investors and speculators to move funds causes major problems for individual countries[76] and can also be destabilising regionally and even globally. This needs more concerted international effort to restrict damaging flows of short-term and speculative funds. The regulation of financial markets and activities is essential. Developing countries with weak legislation and enforcement mechanisms are particularly vulnerable to unscrupulous investors.

Taxation and Restrictive Business Practice

The FTA left the taxation issue, such as international tax avoidance, entirely to each state acting alone. Thus it is developing countries, with their weak capacity and lack of access to information from parent companies, which are least able to challenge transfer pricing and other forms of tax avoidance. Also FTA contained no provisions relating to the avoidance of restrictive business practices. This would favour TNCs, which have superior commercial and technological capacity in relation to domestic competitors and may be able to abuse their dominant market position that includes predatory pricing and anti-competitive acquisitions.

3.6 Revision of the FTA

Voice from Developing Countries

Since FTA would have been a new form of global regulatory framework for conducting foreign investment in the integrated global economy, it inevitably involved nation states including developing countries. Several states have now proposed a modified version of FTA to be negotiated at the WTO. It has been argued that the global integrated production systems and management of TNCs networks cannot function well in a fragmented regulatory framework. On the other hand, it is more difficult for nation states to control and regulate global TNCs with different standards of treatment. In addition, if TNCs from OECD countries, which govern more than 80% of world investment and cover more than 70% of world trade, can enjoy higher standards of protection and more freedom of establishment and operation in host developed countries, the proportion of FDI flowing to developing countries may decline even further. Given the power of TNCs and the need of developing countries for capital, it is not difficult to press those developing countries to accept FTA. Under these circumstances developing countries should have more role in shaping the "agreed set of rules" in the

[76]. This is clearly evidenced by the financial crisis in Thailand and, some years ago, in Mexico.

international investment laws. The broadening of the FTA consultative process to include developing countries government and relevant non-governmental actors is essential. This would allow representatives of those people affected by international investment decisions to voice their concerns directly.

Legal Right for Citizens and Communities, Responsibility of TNCs

Liberalisation of trade and investment has been enshrined and it is well accepted that free trade and investment will bring about common interest to all countries. This ideology is established but nevertheless freedom must go together with responsibility and fair justification for development objectives. Freedom without limitation will cause a more vicious society. Then a FTA should not just provide guarantees for FDI protection and freer investment but should also include responsibility of TNCs to the host countries as well. The balance of freedom and responsibility should go together, or in other words the right of investors should be balanced by responsibilities. For instance, TNCs' responsibility to comply with domestic laws on environment protection, labour laws, health and consumer protection. FTA should also place binding obligation on investors covering taxation and competition policy and restrictive business practices. Social and environmental obligations on TNCs are very essential to the host countries.

Moreover, a desirable FTA should protect the right of the people affected by investments such as workers, consumers and communities where factories are located. The reason FTA should protect these rights is because FTA should balance the rights and responsibility of TNCs, and the responsibilities of TNCs towards host states and/or their people affected by TNCs' operation should be clearly defined in the FTA so that the victims can directly and equally exercise their rights based on the same legal instrument. If the victims need to seek solutions by other means or need to refer the case to other legal instrument or procedure, it would be difficult to jointly enforce such different legal instruments for the same case. And this would be a loped sided legal development of FTA[77]. Unsafe working conditions, dangerous products, and pollution may be caused by the operations of TNCs, which need their responsibilities to be properly dealt with. Since the FTA creates rights for investors enforceable both under local law and by international arbitration, local people also need to be given the right to bring claims directly against the investor. They should also be given the right to present their cases to any tribunal considering a state-state or investor-state dispute, either as affected persons or as representative organisations. This will ensure the right of the person affected by foreign investment to seek remedy from investors.

[77] However, for a contrary view see Henderson, David (1999).

Sovereignty of Government to Regulate Foreign Investment for the Public Good

FTA should provide exemptions, which would guarantee the rights of governments to regulate investment in key sectors for the public good. No one can anticipate what will happen if foreign investors are allowed to control the whole economy of host countries without guaranteeing the right of government to oversee activities of such foreign investment.

Annex

Analysis of FTA provisions from a legal aspect: Study the case of Thai FTAs

Section 1 Scope and Coverage

The words 'investors' and 'covered investment' have been defined in a way that will provide protection for investors and investments. The definitions of 'investment' and 'investor' refer to many things. 'Anyone' or 'anything' that falls under this definition will benefit from an FTA. Thus, portfolio investment will be considered an investment and George Zoros whose attack on the Thai currency led to Thailand's economic crisis would be considered an investor entitled to protection. Provisions on investment under the proposed FTA cover:

1) All benefits under an FTA

2) Entry, admission and establishment for the purposes of investment

3) Full protection from expropriation for investments and investors, other forms of protection under the chapter on investment, such as protection regarding expropriation, and the seizure of property.

4) Entitlement to rights relating to the direct and indirect taking of property due to enforcement of Thai laws, and protection from destruction by riots and the use of force.

5) Entitlement to benefits and incentives, including tax and non-tax incentives

6) The right to freely transfer funds earned from Thai investments abroad.

7) The right to settle disputes by arbitration. Investors may take legal action against the state.

8) 100% equity ratio or entitlement to cumulative equity ratio under ASEAN, based on the principle of MFN as demanded by the United States

9) Entitlement to national treatment (NT) and most-favored-nation (MFN) treatment in all cases under the FTA

10) Benefits from provisions on the issue of management, which allows 100% foreign directorship. Members of the Board of Director need not be Thais.

11)By virtue of unrestricted fund transfer provisions, foreign investors are not restricted by financial measures. This will make it difficult to control foreign remittances. In particular, the inability to control short-term capital is dangerous. Thailand had this kind of financial disaster during the financial crisis of 1997.

12) Benefits from state-investor dispute settlement by arbitration. Foreign investors may take legal action against the state.

13) Entitlement to benefits under other bilateral and multilateral treaties to which Thailand is a party, such as benefits under ASEAN

14) Entitlement to benefits accorded by the law and other investment measures as well as other related benefits such as investment promotion under the principle of NT/MFN.

15) The right to indirectly own or control investment.

Even though Thailand has proposed 'Direct investment', this could be circumvented without much difficulty.

*The words' '**investor**' and '**investment**' have been defined in the General Definition Clause of the Investment Chapter. Thailand has accepted that "Investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. An investment may be in the following forms:*

(a) An enterprise

(b) Shares, stocks, and other forms of equity participation in an enterprise

(c) Bonds, debentures, other debt instruments and loans;

(d) Future options and other derivatives;

(e) Turnkey, construction, management, production, concession, revenue-sharing, and similar contracts;

(f) Intellectual property rights;

(g) Licenses, permits and similar rights conferred pursuant to domestic law; and

(h) Other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges

Originally, the wording in a Bilateral Investment Treaty (BIT) was "investment brought into, derived from or directly connected with investment brought into the territory of any Contracting Party by nationals or companies of any Contracting Party and which are specifically approved in writing and registered by the host country"

Also, in the past the authority to approve investment belonged to the host country. The treaty would clearly stipulate that "*Each Contracting Party will endeavor to admit in its*

territory, in accordance with its legislation, the investment of capital by nationals or companies of the other Contracting Party…" "...Investment owned by, or under the management or effective control by nationals or companies of each Contracting Party …" However, in the future, Thailand would have to grant national treatment in the pre-establishment stage to U.S. investors.

Article 2: Regarding the relation to other chapters

The wording *"In the event of any inconsistency between this chapter and another chapter, the other chapter shall prevail to the extent of this inconsistency."* sounds good. However, there is a small chance of inconsistency between the chapters per se. Inconsistencies tend to be from issues within a particular chapter. For example, the issue of investment prohibited by the Environmental Protection Law may be raised for consideration in the Chapter on Investment, not the Chapter on the Environment. In particular, such investment may be considered as indirect expropriation or else it may be reviewed on a case by case basis, but not under the Chapter on the Environment. It will then be linked to the issue of Dispute Settlement by Arbitration because it is about whether such investment is permissible or not. In this case, where it is inconsistent with environmental law, the environmental law shall apply. That is, the investment or the business cannot continue because it is contradictory to the environmental law.

Section 3 National Treatment

Sections 3.1 and 3.2 provide that National Treatment be adopted at the pre-establishment stage, thus placing Thai and U.S. investors and investments on equal footing. They are not subject to provisions on selection of investors and investments. Other Trade-Related Investment Measures (TRIMS) cannot be used as a condition for accepting investment or for investment promotion. Although some may think that TRIMS are the same as provisions under an FTA, in fact, FTA goes far beyond TRIM-Plus through the mechanism of the Negative Approach. Whether TRIMS are enforced or not does not affect the core sovereignty. However, FTA will have an impact on core sovereignty if Thailand agrees to be bound by the Agreement.

Section 3.3 stipulates that Thailand grant National Treatment to U.S. investors, i.e., under the same conditions as Thai investors even at the local level. The .S. had a lesson with China at the level of 'conflict of law.'

Section 4: Most-favored-nation-treatment

Sections 4.1 and 4.2 demand that Thailand give the most-favored-nation treatment' to U.S. investor and investments in the same manner that it does with nationals of other countries. This includes the same treatment that Thailand has accorded investors and investments under any regional or bilateral agreements, such as those under ASEAN in the AIA and AFAS Projects. This means that the U.S. demands ASEAN-Plus treatment as well.

Thailand has made a reservation against commitments at the regional level under Section 4. It is yet to be seen whether the U.S. will agree to this. It is anticipated that the U.S. will not accept this.

Section 5: Minimum Standard of Treatment

This Section calls for the application of customary international law, which is broad, and has mostly evolved from the Western World and developed countries. In other words, it revokes the international economic order of the decolonization stage whereby the respect for sovereignty of the state surpasses natural resources and the economic rights of nationals. The U.S. is demanding full protection: *"Fair and equitable treatment"; "Full protection and security"; "Do not deny justice… process embodied in the principal legal systems of the world"; "… to provide the level of police protection required under international law"; as well as the better than best treatment among NT, MFN and minimum standard.*

Section 5.3: If the United States is in breach of any provision or obligation under any agreement (to which the U.S. is not a party), the U.S. shall not be deemed as having breached any commitment under this treaty.

To sum up, if Thailand is granting any rights that are better or more useful, such rights have to be granted to the U.S. too. However, any commitment that the U.S. does not wish to be bound by and is not a party to such agreement, Thailand cannot force the U.S. to comply. In all, the U.S. wants to receive all the good things and the rights, but denies the duties.

Item 4. Thailand has to be responsible for any loss or damage even when it arises from the use of force, a civil war, or a riot. Thus, if Thai people rise to destroy a factory or rise against investment, or stage a demonstration or destroy property, or if there is a riot, regardless of Thailand's full effort to take control in line with international laws governing the state responsibility, Thailand will be held responsible, even in the case of a force majeure, if Thailand agrees to be bound by this Section.

A matter of great concern is the fact that several state enterprises and public utilities will be privatized. After liberalization, there is a very good chance that they will fall into the hands of foreign investors who have superior capital and technology, be they electricity, waterworks, train or telephone services.

Privatization of state enterprises is common in other countries. There is nothing unusual about it. However, the way it is carried out in Thailand is quite different for the following reasons:

These state enterprises are cost intensive public services. By nature, it is an investment in the oligopolistic market, or natural monopoly in some countries. In a market like this, it is natural that there will be few competitors. There is a better chance that the enterprises will

belong to foreigners than to the Thais. In other countries, with privatization, the enterprises are still in the hand of nationals of those countries and the money is still circulated domestically in the national interest. If Thai state enterprises are privatized and then fall into the hands of foreigners, the profits earned will be exported. The money put into the investment has to be regained and all the profit sent abroad according to the obligations under the Chapter on Free Transfers of Funds of the FTA.

At present, the development of alternative energy has not yet made much progress. The shortage of energy will make it possible for foreigners who have acquired these businesses to introduce the use of nuclear energy. This is a very cost intensive investment. If the Thai people do not want a nuclear energy plant and stage a resistance, the government will have to take responsibility. If the construction of a nuclear power plant is allowed to proceed, Thailand will risk a tragedy like the Chernobyl nuclear power plant in Russia which, despite the advanced technology used experienced a mishap, killing and injuring a large number of people and leaving a huge number of people to suffer from cancer. It was like being hit by a nuclear bomb. If the government will not allow the construction, it will have to indemnify the business owner, together with an enormous amount of interest. The Thai people will have to bear this burden in accordance with the agreement on Indemnification, Expropriation and Taking of Property.

When the government cannot control or fix service fees, consumers will bear the high cost. It will put poor people in a difficult situation.

In order to succeed in competition in accordance with the objectives, and to benefit from comparative advantages and economy of scale, competitors must have equal capacity. If one competitor is a champion and the other is a crippled child suffering from malnutrition, the latter has no chance to compete under any circumstances. What is important is that the crippled competitor will be robbed of the opportunity for long-term development. Even if this child with malnutrition is holding a holder tray in his hands, it can still be taken from him by force.

The definition of the term “economic gain” emphasizes money and materials, but lacks anything on the quality of life. The gap between the rich and the poor will widen.

We should think carefully and live within our means, in line with His Majesty’s concept. Keep this land so that our descendants can live here happily for a long time. Keep our natural resources and Thai wisdom so that they will remain sustainable. Develop the Thai people so that they will have a lot of wisdom. Sustainable development is appropriate for Thai people. There is no need to grow fast but with a hollow inner body. If there is no land left for the Thais and rice has to be bought for consumption, are we going to be happy?

This land needs honest people who have the wisdom to lead this country steadily without becoming anyone’s slave, because Thai people were born and will die in the land of the Thais. They will not run away. Thai people can go to the United States to invest, but with a lot fewer opportunities. This is one way investment - one way preferential treatment.

U.S. investors will ruin natural resources, leaving behind empty land filled with pollutants and toxins for the Thais.

Item 5 requires Thailand to take full responsibility in exercising its power under the law, either by enforcement or by legal power, i.e., 5 (a) and 5 (b). However, Thailand wishes to indemnify in the same way as indemnification for damage caused by seizure of property, based on the principle of prompt, adequate and effective action in regard to the seizure of property.

If Thailand fails to provide protection or provides insufficient or inefficient protection for intellectual property, Thailand has to be responsible. If Thailand fails to force compliance to the law by Thai factories, Thailand has to take responsibility as well and may have to pay compensation, as in the case of expropriation of property.

Item 6: Expropriation and compensation

There will be no taking of property directly or indirectly except for the public benefit. There will be no discrimination but there will be full compensation and it will be in accordance with a lawful process under Sections 5.1-5.3.

Section 6.2 b

Compensation must be made without delay before the taking of property or must take place on the day the property is taken, at market price, based on the value of the taken property. It must be possible to transfer the compensation money abroad freely. The compensation must be in an exchangeable currency and must be made with interest, at a rate that is commercially appropriate, although there is no mention as to who will determine the interest rate and on what criteria the rate will be based, from the date of the expropriation until full compensation has been made.

The problem with this Section is that, if if a U.S. investor's property has been taken indirectly, it is still subject to this Section. Thailand will have to pay interest from the date the property is taken. Thus, in addition to being liable to indemnification based on the principle of expropriation, Thailand will also face the demand to automatically pay interest. This means that the interest will always have to be paid in the case of indirect expropriation. Have there been negotiations to exempt this?

Section 7: Transfers

Transfers abroad of money or benefits can be done freely, without any restrictions and at the market exchange rate at the time of the transfer. The problem is: What is investment? Every type of profit from investment can be transferred, thus it is essential to know what the extent

of investment is, because it represents the extent of benefits from the investment. Transfers can be made without restriction if the investment is without restrictions.

Section 8: Performance requirements

Investment measures prohibited under Section 8 are more extensive than TRIMs. In fact, TRIMs only cites examples and there is the right to propose negotiations after the transition period. Prohibitions under TRIMs are those set by the host country as conditions to accept or promote investments. Under the FTA, this cannot be done, whether they are set as conditions (Section 8.2) or not (Section 8.1). Therefore, the benefits that the host country gains from investment, such as transfer of technology, development of scientific knowledge, management, marketing or other measures once used for investment promotion are no longer useful.

Moreover, investment is not going to attract cash to the country as once anticipated. Every Baht and every satang brought into Thailand will be exported with profit and nothing will be left for this land and the Thai people. The remaining working capital will be for business operations to maximize the profit of the corporate owners.

Although paragraph 3(a) states that setting certain measures is not prohibited, this is mainly for unilateral benefit of the operators, and not for Thai society as a whole. These include measures to designate a production site, and those relating to providing service, personnel training, employment, construction, equipment installation, materials, tools and measures for research and development. Section 3 (b) does not allow paragraph 1 (b) to be applied to the transfer of technology, production processes or any other knowledge to any person in the host country which only benefits corporate interests.

Section 8.3 (c) may allow "adopting or maintaining measures, including environmental measures", but there is no mention of enforcement of environmental measures. Moreover, the Chapter on Investment also states clearly that such measures must not be inconsistent with the FTA, i.e. "laws and regulations that are not inconsistent with this Agreement." Apparently, the issue of investors and environmental problems will fall under the topic of "Investment" if there is impact on the investment that leads to a dispute, i.e., under Section 5.5 (a) (b), together with Section 4 (a), Annex B.

Section 9: Senior Management and Boards of Directors

The treaty prohibits limitations regarding the nationality of the management. Thailand used to have such limitations to retain the power to control, manage and oversee business organizations. Thais will not have an opportunity to own a foreign company because it can no longer

designate equity ratio. Foreigners can have 100% shareholding. Thai people will not have an opportunity to be members of the boards of directors as they were able to in the past.

There has been an argument that Thailand has already granted the right to hold 100% shares and so there is nothing to worry about. There is a need to understand that, by general legal principles, we have share holding limitation, i.e., not exceeding the 49:51 ratio. This went on until the implementation of the investment promotion measure that allows shareholding of up to 100%. This is possible only when such shareholding is under the investment promotion requirements and numerous other conditions, such as local content requirements, export, allocation of investment, etc. Other cases include measures under the Hanoi Plan, ASEAN cooperation, and short measures to stimulate investment after the financial crisis. However, those were temporary and specific measures that could be revoked at any time. They were not permanent law. The FTA, on the other hand will require Thailand to pass a law to complies with obligations under the treaty.

There has been an argument that even with the 49-51% shareholding requirement, in practice there are several ways to circumvent this, including shareholding through nominees. Those approaches are against the intent of the law. In other words, they are an unlawful acts, which, if found, will be considered wrongdoing

Although Section 9.2 allows this, it is under the requirement that this shall not have impact on, or cause the loss of management power over investment. It is apparent that this is difficult to do in practice. There is no way that Thai people can interfere if the investor is the sole owner.

Section 10: Investment and environment

Although the wording sounds good, it is within the context of *"measures otherwise consistent with this Chapter"*.

Section 12: Non-conforming measures

Item 3: After the treaty takes effect, a state party shall not use measures to require that the investors sell, or dispose of, or transfer, or withdraw their investment for any reason relating to the investors' nationality.

Section 14: Dispute settlement by which <u>a private party is granted the right to take direct legal action against the state</u>

The Thai government can be sued for thousands or tens of thousands of millions Baht as seen in Mexico and Canada. Or, the state may find a way out by **giving in** to avoid being

sued by a private party, i.e., by not passing the law or regulations that will protect the environment or its nationals, or by abolishing the existing law. In this way, judicial sovereignty is also affected.

What is notable is that **foreign investors have more rights than Thai investors** in taking action against the state, because they have the rights under the provisions on **protection of foreign investment.**

Item 5. **The final award of the arbitrators shall be final and bind the state party**, and the state party has to promptly comply with the final award. Also, in Item 6, the state party shall not make a demand for deduction of the compensative due.

Section 15: Referring dispute for arbitration

This applies to a dispute relating to a breach of the agreement on the commitment under the treaty, a breach of the investment agreement, or a breach of duties by an agency overseeing investment, damage caused to investments and investors under any circumstances, directly or indirectly.

Rules and regulations of UNCITRAL, ICSID, and the New York Convention are adopted. For enforcement of the arbitration award, the Thai courts will be responsible. An arbitration award does not have legal effect itself but is Pacta Sunt Servanda. Failure to comply with the arbitration award is therefore a breach of the agreement. In view of this, the proposed FTA demands that Thai courts immediately enforce the arbitration award.

Section 16: Consent of each party to arbitration

Arbitration requires consent of the parties and a state party has to give consent in writing and in accordance with ICSID provisions on jurisdiction over the decisions in dispute. The enforcement also has to comply with the New York Convention.

Section 21: Governing law

International laws, laws agreed upon by the parties, and laws stipulated in the agreement shall apply. If there is no agreement, the principle of conflict of law in international law shall apply.

Interpretation under the Chapter on Settlement of Dispute shall be within the power of the Joint Commission and the arbitration award shall be consistent with the opinion or interpretation of the Joint Commission. If the Joint Commission fails to decide, such power shall be vested in the arbitrator(s).

Section 25. Item 10 *"A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purpose of Article I of New York Convention"*

Section 29. Even measures to limit the transfer of funds abroad when there is a monetary deficit, are under IMF measures, and consideration must be given to the economy and economic damage of the other party.

Annex A: Customary International Law is recognized by the international community, especially in terms of the protection of foreign investors.

"Expropriation Annex B

4. (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by- case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action,

(ii)

(iii) the character of the government action"

There is no opportunity to see the whole treaty, especially the parts on General Definition, Entry into force, and Consent to be bound by the State, which are very important subjects. Therefore, it is not known whether there are any provisions that may affect others. For example, investors may get double windfall benefits from investment promotion, such as tax exemptions, and at the same time receive benefits under the FTA. There are also the issues of investment and the environment.

In terms of tax-related problems, the question is how Thailand has made reservations about taxes so that they will be without loopholes. Otherwise taxes from investment that should be under the Thai sovereignty will be exempted and the money sent abroad. This refers also to other effects from tax planning, tax avoidance, tax havens, conduit companies etc. Taxes are national income. If the government cannot fully collect taxes, there will be nothing left for the nation and there will be no budget for national development.

In addition under the economic cooperation treaty Japan has entered into with other countries, like the one with Thailand (which may also appear in the Thailand-Japan FTA), tax collection is considered indirect expropriation of property. If Thailand signs a treaty with Japan, the United States also gets the benefits under the MFN treatment. Efforts are being made to demand to see the documents to verify this information.

4.2.5 Genetically Modified Organisms (GMOs)

(1) Negotiation topics of the Thailand-United States FTA

Although the Thailand-United States FTA negotiations do not include the demands regarding Genetically Modified Organisms (GMOs) as a separate topic, under the topic of Agriculture, there are demands that are related to GMOs that would lead to liberalization of trading in GMO goods.

The U.S. demands under the topic of Agriculture that are related to GMOs are as follows:

1) A demand for the negotiation partner to strictly comply with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) of the World Trade Organization.

2) A demand for the negotiation partner to eliminate all trade measure that impact biotechnology such as labeling of GMO products.

Such demands appear in the U.S Trade Promotion Authority law (Sec. 2102, Item b (10)-VIII) and in the U.S. negotiation framework with Thailand, as shown in the documents submitted by the U.S. Trade Representative (USTR) to the U.S. Congress.

Under the SPS agreement, member states are granted the right to use measures to limit importation of products that may be harmful to the life and health of human beings, animals or plants. These measures must be based on international standards or supported by scientific evidence when they are implemented. Although there are provisions on exemptions in Section 5.7 for new issues without sufficient scientific evidence, member states are allowed to use provisional measures based on available information, including data from international organizations and sanitary measures enforced in other counties, provided that they investigate for additional information to supplement their risk assessment.

(2) Policy on and management of GMOS in Thailand at present

Thailand's current policy on GMOs is to not allow importation of GMO seeds for cultivation for commercial purposes until there is scientific evidence to verify their bio-safety and food safety. Such a policy resulted from a resolution of the International Economic Policy Committee in their Meeting No. 5/1999 on 18 October 1999. The said resolution was presented to the cabinet for acknowledgement and has since become the policy.

The existing law that empowers the state to set such a policy in the Plant Quarantine Act, B.E. 2507 (1964), under which the Notification of the Ministry of Agriculture and Cooperatives on the Designation of Plants, Plant Pests and Carriers from Designated Sources as Prohibited Items, Exceptions, and Conditional Items has been issued, (No. 2, in 1994). There are 89 GM plant species on the prohibited list, including rice, corn, soybean, papaya, potato, carrot, cucumber, tomato and apple.

In 2000 the sub-committee on Biotechnology Policy, established by the Committee on International Economic Policy, passed a resolution to add more exceptions in the case of GMO corn or soybeans used as raw materials for the production of animal feed and remove them form the list of prohibited items under the Plant Quarantine Act. This was because it was confirmed in a sub-committee meeting that such utilization of GM soybean and corn or their industrial use was safe, and domestic production of corn and soybean could not meet the demand. This was followed by the Notification of the Ministry of Agricultures and Cooperatives on 17 March 2000 that annulled the 1994 Notification and approved their exceptions as mentioned above. Since then it has been possible to import GMO corn and soy been for feed, food and industrial utilization in Thailand.

From 1992, 38 GM plant species have been imported into Thailand for safety testing, including corn, cantaloupe, tomato, cotton, white grain rice, jasmine, and papaya. Nearly all of them were imported by private transnational corporations, led by Monsanto (16 items). Other companies include Novartis (3 items) and Cargill Seeds Company Limited (1 item).

As for labeling of GM goods, the Minister of Public Health, by virtue of Section 5 and Section 6 of Food Act B.E. 2528 (1979), issued the Ministerial Regulations (No. 251) B.E. 2545 (2002) on labeling of food derived from genetically modified sources or genetic engineering. Under this Notification, soybean, corn and their products derived from genetic modification or genetic engineering have to be labeled. A condition was set that they have to be soybean, corn and their products (as shown in the list attached to the Notification) with at least 5% of DNA or protein from each top three ingredients and each ingredient has more than 5% by weight of the product.

So far Thailand does not have a specific bio-safety law governing GMOs. Although existing related law can be enforced to a certain extent, e.g. the Plant Quarantine Act B.E. 2507 (1964), there are still loopholes and limitations. There have been several attempts to draft more bio-safety laws, such as that of the sub-committee set up to resolve the problems of the Council of the Poor, the drafting of the bio-safety law in 2001, and the work of the sub-committee for drafting of a bio-safety law established by the National Environment Board in 2003 (by the resolution No. 2/2006). Most recently the Natural Resources and Environmental Policy and Planning Office completed the draft bio-safety law. It was being revised while receiving comments from related parties (Information as of July 2006).

To sum up, under the existing policy and law, Thailand allows cultivation of genetically modified plants (or raising genetically modified animals) for commercial purposes in the country for the research purpose, but not for commercial purpose. However permission has been granted to import GMO corn and soybean for industrial use and animal feeds. There is still no specific law governing biological safety at present.

(3) Analysis of Potential impact from demands on genetically modified products

There are several dimensions of the potential impact on Thailand from the U.S. demands on genetically modified products.

(3.1) Impact on rules and regulations of Thailand

Strict compliance to SPS measures under WTO will make it impossible for Thailand to fully implement measures to limit importation of agricultural products from the U.S. that are GMOs or have GM components, or of modern technology, to protect the ecosystem and environment based on the Precautionary Approach, or to limit importation by socio-economic justification (e.g. impact on local farmers, impact on market monopoly, etc.). This is because WTO conditions regarding the use of SPS measures with trade call for proof by scientific evidence. In the case of GMOs, there are no acceptable scientific conclusions on their effects on health and the environment.

The Precautionary Approach is a principle under the Bio-safety Protocol. Its essence is that, although there is insufficient scientific evidence, if the objective is for the purposes of conservation, sustainable use of biological resources and biodiversity, or prevention of human health risks, a member state of the protocol may decide to approve or not approve the importation of GMOs [24]

(3.2) Impact on the environment

The limitation of the use of environmental reasons to limit importation of GMOs could leads to claims. Thailand has to face the risks from potential environment impacts arising from importation of more GMOs from the United States into Thailand.

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[24] The term Living Modified Organisms is used in the Protocol

There have been reports from studies on the impact of GMOs on the ecosystem and environment, such as impact on useful insects, on micro-organisms in the soil that are useful to plants, on problems of super weeds and transgenic plants from cross breeding with local plants, and the problem of the increasing use of chemicals as pesticides.[25]

(3.3) Impact on the right to develop the country

Thailand is a party to the Convention on Biological Diversity, under which there are a number of requirements and commitments that Thailand has to comply with. In other words, Thailand can implement measures and guidelines stipulated in the Convention and the Protocol to oversee GMOs as appropriate to be in line with Thailand's policy.

If Thailand has to strictly adhere to SPS under WTO as demanded by the United States, this will have impact on compliance to commitments under multilateral agreements on the environment to which Thailand is a member state. This is because the principles and practical guidelines of the said multilateral agreements are inconsistent with SPS guidelines. Moreover, Thailand will be affected by the fact that measures or tools to oversee GMOs cannot be implemented to be appropriate for Thailand's needs if such implementation is in conflict with SPS agreements.

The United States is not a member of the Convention on Biodiversity and the Bio-safety Protocol. Moreover, as part of the contents of the FTA in the Environment Chapter, the United States has indicated that it will accept only commitments in international multilateral agreements to which both Thailand and the United States are member states.

(3.4) Economic Impact

The economic impact of liberalization of trade in GM products is multidimensional, e.g. the impact on the patent system that grants monopoly to seed owners, thus pushing up the production cost; the consumers' acceptance, the labeling cost; the environmental cost; risk management, etc.

One factor that supports the utilization of GM plants is the reduction of agricultural chemicals used by farmers for cultivation. This will reduce production costs and is favorable to the environment. However, according to a study by Benbrook (2003)[26], which collected data on pesticide use in the United States after eight years of utilization of genetically engineered crops, GMO plants could become resistant to pesticides, resulting in an increase of pesticides use by as much as 70 million pounds while the cultivation of GMO crops will reduce only 19.6 million pounds of pesticide use. The net increase of chemical use is 50.4 million pounds.

(3.5) Social Impact

If Thailand agrees to liberalization of trade in GMOs, this may lead to conflict between GM crop growers and farmers in the nearby areas who do not wish to grow GM crops, but who may be affected by contamination of GM plants and have to increase expenditures for prevention of such contamination, especially among organic farmers. This is because according to the international standards for organic agriculture, there are provisions prohibiting the use of genetically modified plant varieties or raw materials for production. This problem may lead to conflicts within the community or/or between groups that are for and against the use of genetically modified plants.

4.2.6 Biodiversity

(1) Related negotiation topics in the FTA

In the Thailand-United States FTA negotiations there is no specific chapter on biodiversity. However many aspects of the negotiations will have an impact on biodiversity:

1) Negotiations on liberalization of the agricultural sector, on the issues of subsidy reduction and the decrease of customs tariffs that affect the extension of monoculture.

2) Negotiations on intellectual property on the issue of extension of protection of patents of organisms, which will have impact on changes in Thailand's legal system on protection of biodiversity *(See section on Patents of Living Organisms).*

3) Regarding the liberalization of genetically modified organisms, the United States has made a demand for Thailand to strictly comply with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) under the WTO and for Thailand to eliminate trade measures that have an impact on biological technology, such as labeling of GM goods. *(See details in the section on Genetically Modified Organisms).*

4) Negotiations on investment under which the United States demands that Thailand provide a high level of protection of investors' benefits, with a scope that covers the protection of intellectual property.

(2) Analysis of potential impact on Thailand's biodiversity

The impact of the U.S. demands under the Thailand United States FTA regarding biodiversity covers four issues:

(2.1) Impact from agricultural liberalization on biodiversity

The impact on biodiversity from agricultural liberalization is the expansion of land for monoculture of plants for export. This is one aspect of the impact that should be taken into consideration in the FTA implementation. An example that can clearly reflect this problem is the issue of rice.

Rice varieties in Thailand are highly diverse. It is assumed that rice varieties are cultivated in Thailand under over 5,000 names. This diversity has ensured food stability and economic security for the country. [27]

Thai rice varieties have been developed with consideration given to the quality of seeds, especially their shape and cooking quality. As a result, Thai rice seeds are of good quality,

suitable for consumption and meet the market demand. The long and clear seeds have became unique for Thai rice. Rice seeds of good quality have contributed to Thai rice being the world market leader but at the same time, the focus on cultivating varieties that are in demand in the market has minimized the diversity of rice varieties.

According to statistics from 1992, rice cultivation covered 56.29 million rai, of which 15.79 million rai or 28% of all the cultivated area was used for the cultivation of local varieties. In 2005, local varieties accounted for 7.12 million rai, or about 13% of the total cultivated area. Within ten years, the growing area of local rice varieties dropped by more than half. If this situation continues, in the near future, there may be no cultivation of local rice varieties [28]

Thai rice varieties have become more popular among farmers because of their high yield and seeds that meet the market demand. New variations have been cultivated in replacement of local varieties and there are fewer varieties in the cultivating areas.

(2.2) Change in Thai laws and regulations in the cases of Plant Varieties Protection Act and Patent Act

If Thailand accepts the U.S. demands to extend the protection to cover all living organisms, i.e. animals, plants, and micro-organisms, the law governing biological resources will have to be changed from being under the *Sui generis* System to the patent system (See details under the heading Patents of Living Organisms). To do this will affect the regulation of utilization of bio-diversity in Thailand. There will be problems of unfair taking of Thai biological resource for utilization, bio-piracy and sharing of benefits thereof.

(2.3) Problems from GMOs and alien species

Under the proposed FTA, the United States demands that Thailand strictly adhere to WTO Sanitary and Phytosanitary Measures and that Thailand eliminate trade measures that impact biological technology, such as labeling of GMO products. If Thailand agrees to accept such

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[27] Songkran Chitrakorn and Bariboon Somrit 2005. Thai Rice Variety Resources: Have they become Extict? A document submitted during an experts conference on Conservation and Protection of Thai Rice Variety Resources on 29 November 2005, at Sarasonthet 50 Years Building, Kasetsat University.

Thus the diversity of plant varieties has decreased. This is very dangerous in the case of an epidemic of diseases of insects, as the damage could be severe and extensive. Therefore, if the export of rice is going to increase as a result of the Thailand-United States FTA, according to an analysis derived from a mathematic model, the extension of rice cultivating and the change from cultivation of local varieties to varieties for export, will intensify the problem of the decrease of biodiversity. This problem is not limited to rice, but will also apply to other plants.

demands, Thailand will have to be more open to products that are, or have components that are, genetically modified organisms, including alien species.

GMOs also have been reported to have impacts on the ecosystem and environment, on useful insects, and on micro-organisms in the soil that are useful to plants. There are also problems of super weeds and cross-breeding with local plants.[29]

Moreover, there will be problems of the increasing use of chemicals as pesticides. In the case of the United States, studies show that after 8 years (1996-2003) of commercial cultivation of genetically modified plants, there was a drop of 19.6 million pounds in chemicals used as insecticides. On the other hand, plants that can resist pesticides contributed to an increase in the use of chemicals to get rid of weeds by 70 million pounds. In all, the use of agricultural chemicals increased by 50.4 million pounds. [30]

(2.4) Impact from liberalization and investment protection

A study conducted by Correa (2001)[31] reveals that the Investment Chapter in the FTA has wider coverage than provisions under international agreements. This is due to the extension of the coverage of intellectual property to be wider than the requirements in TRIPs and the application of the National Treatment (NT) without exceptions as stipulated in international conventions.

Also, the meaning and extent of the "right to intellectual protection" in the Investment Chapter, which may lead to the dispute settlement process, are still unclear. This is particularly true in the case of problems arising from the "Compulsory License" measure by which investors may claim damages. There are also problems arising from measures that make the disclosure of "origins of genetic materials" compulsory, to prevent problems of biological piracy, as investors may raise this issue in terms of inconsistency with international law.

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[29] National Academy of Science, 2002. Environmental Effects of Transgenic Plants : The Scope and Adequacy of Regulation. Committee on Environmental impacts Associated with Commercialization of transgenic Plants National Academy Press. Washington, D.C.

[30] Charles M. Benbrook, 2003. Impacts of Genetically Engineered Crops on Pesticide Use in the United States: The First Eight Years. BioTech InfoNet. Technical Paper Number 6. November 2003.

[31] Correa M. Carios. 2004. Bilateral Investment Agreements : Agents of new global standards for the protection of Intellectual property rights? (http://www.grain.org)

With the lack of clarity regarding the protection of intellectual property, there is a high possibility that investment related disputes will lead to the amendment of intellectual property laws of developing countries, even though such laws are consistent with TRIPs.

Correa raises potential problems that may lead to disputes related to biological materials and genetic materials in connection with the Investment Chapter such as:

- Biological materials that have been stored or acquired under the permission to access such materials may be interpreted as "assets" of the collector and protected.

- Problems for the state's revocation of the permit or the agreement for access to genetic materials. The party whose permit or agreement is revoked may demand the right to protection or compensation of the damage caused to the "investment".

- Problems may arise from aliens who are granted permission to be collectors of biological materials. "Assets" collected under the definition of "investment" are very broad. For example, if the state enforces the return of collected biological materials or benefit sharing, the collectors (in their capacity as investors) may file a lawsuit on the ground that their right in the assets has been infringed.

- Problems may arise from the fact that the "genome data" of living organisms acquired as the result of research by transnational corporations in Thailand should be data accessible to public organizations or used for research.

- Conditions in the Investment Chapter, such as in the case between the United States and Singapore, limit state authority to stipulate Performance Requirements, e.g. prohibiting the forced transfer of technology, whereas the Convention on Biodiversity (Section 16) has provisions on the transfer of technology relating to conservation or sustainable utilization of biological materials. This may lead to conflicts between the Chapter on Investment in the FTA and compliance with commitments under MEAs-and thus may affect the sustainable management of biodiversity.

In the United States-Singapore FTA, declared by the United States as a model for FTAs with Southeast Asian countries, the word "investment" is broadly defined to cover intellectual property as well (article 15.1-13: FTA U.S.-Singapore)

It is notable that in the Thailand-Australia FTA, which has been signed and is currently operating, the word "investment" is also broadly defined to cover the right of intellectual property. [32] This shows that Thailand is apparently going to accept a broad scope of investment protection.

5. Proposals on Prevention of Impact or Remedy for Problems

Based on the analytical report on the anticipated impacts on human rights and other impacts of the Thailand-United States FTA implementation, the sub-committees wish to propose preventive measures and remedies for anticipated problems as well as policy-related recommendations for the Thailand-United States FTA negotiation for the following issues:

5.1 Negotiation process and execution of the treaty in general

5.1.1 The government should give importance to the execution of treaties that are relevant to the interests of the country and the majority of its people and should have experts in respective fields participate in reviewing the treaties instead of letting government officials handle the matter alone. The United States uses experts in specific fields, especially lawyers, to directly oversee different sectors of the negotiation.

5.1.2 During the intention declaring stage during which the countries show the intent to be bound by a treaty, Thailand should agree to be bound by the treaty only when it is ratified by parliament, and not be bound immediately upon the signing. This will give Thailand an opportunity to review the authentic enforceable provisions, because neither party knows the essence of a treaty prior to authentication. Time should be given to the government and the people to carefully review the pros and cons. There should not be a time frame for ratification as the United States itself took over 40 years to ratify some signed treaties.

The issue of FTA implementation should be presented to the Parliament to comply with the constitution since ratification of a treaty requires the parliamentary approval.

5.1.3 Thailand should delay the negotiations for the time being to be able to carefully scrutinize important issues and earnestly study the sectors that will be affected by FTAs. It should assure that the treaty be appropriate for the Thai economy, so that Thailand will gain maximum benefit from FTAs. Moreover, Thailand should not agree to be bound by the treaty by signature only, but should specify that signing requires further ratification. In this way, Thailand will have the opportunity to review the text before being bound by ratification and the text can be reviewed by the

Parliament and the people. Reservations should be made on important matters and consideration must given to the country's sovereignty.

5.2 The substance of negotiation

5.2.1 Agriculture and the Environment

(1) Thailand should ask to reserve the right to prescribe measures to be used in the agricultural sector for the purposes of environmental protection and conservation, e.g. promotion of sustainable agricultural production, measures for conservation of the environment in farms and paddy rice fields.

(2) Thailand should insist on its rights to fulfill commitments under various international environmental agreements relevant to agriculture, to which Thailand is a member state, such as the Rotterdam Convention, the Stockholm Convention, etc. It should be clearly defined in the Thailand-United States FTA that fulfilling such commitments shall not be considered non-tax trade barriers that must be eliminated after the liberalization of the agricultural sector.

(3) Plans, projects, and measures should be prepared to cope with the environmental impacts of production expansion in the agricultural sector that will benefit from import tax reduction by the United States. Relying on anticipated increased revenues from liberalization of the agricultural sector and expecting that this will theoretically lead to increasing environmental conservation is not a sufficient guarantee.

5.2.2 Intellectual property

(1) Medical and health systems

Three key issues must be taken into consideration for the FTA negotiation strategies.

1) Tactics in acquiring comprehensive information to be used in the negotiations.

2) As a strategy for the negotiation process, parties from all sectors, not only the administration sector, must be involved. The matter must go through the legislative process, i.e., the Parliament, and must entail public participation from all sectors, not just major business groups.

3) Regarding matters relating to medicines and public health services, the government must adhere to the principle that, in appraising the impact, consideration must be given to patients and consumers, and self-reliance in terms of drugs and public health. If the demands impact on health condition and access to drugs and public health services, they must be rejected without being compared to benefits offered by the United States. This is because according to the principle of human rights and the Thai Constitution, every person has fundamental rights to good health. There are examples of the impacts of bilateral trade negotiations based on the text of the agreements that the United States have concluded with other countries such as Singapore and Chile. A market monopoly in pharmaceuticals was reinforced, drugs became more expensive and local drug industries did not have the capacity to compete with transnational drug companies. There was a lack of security in the area of public health, and increased expenditures for drugs.

Therefore, as a strategy for trade liberalization in negotiations with respect to the problem of poverty, on the issue of access to drugs and public health, the issue of intellectual property protection relating to drugs and public health services should not be considered in the bilateral trade negotiations. This is in the same category as the United States not agreeing to include support for its agricultural sector as an issue on the Agenda. At present Thailand has already granted intellectual property protection to drugs in accordance with international standards (TRIPs). If there is a desire for more protection (TRIP Plus), the issue of health should be treated at the multi-lateral level. Health is a fundamental human right and a human right under the Thai Constitution. It is essential to take precaution in setting appropriate standards that will not affect access to drugs and the ways to resolve public health problems.

(2) Patents over living organisms

1) Thailand should not accept the U.S. demands on the issue of plant and animal protection under the patent system. It must stand firm on the principle and the rights of WTO member static as stipulated under TRIPs, which accord member states the right to deny plant and animal protection under the patent system.

2) Thailand should express its position that an efficient specific law for plant verity protection does not mean the UPOV convention in any way. Moreover the Thai laws on plant varieties under the Plant Varieties Protection Act, B.E., 2542 (1999) is already consistent with commitments under TRIPs. It is the law that provides protection and promotes development of new plant varieties as well as adequate and fair protection for plant breeders. It is a legal system prescribed to be appropriate for the socio-economic conditions and needs of Thai society, which is an agrarian society. There is no need to cover the plant variety protection under the UPOV Convention or the patent system.

3) Thailand should propose the inclusion of the provision of the Convention on Biodiversity in the Free Trade Agreement. That is the principle of assess to and utilization of genetic materials and fair profit sharing from such utilization. The objectives are to prevent the abuse of genetic materials and to increase the efficiency in protecting Thai genetic materials. These

includes the requirement such as Disclosure of Origin in the case of genetic materials used for breeding; the Prior Informed Consent with respect to access to plant genetic materials, and Benefit Sharing among breeders and owners of genetic materials, etc.

5.2.3 Services and Public Health

(1) Services and Public Health

(1.1) Following the analysis of the impact of the Thailand-United States FTA with respect to services and public health, consideration should to be given to two aspects.

1) **Health care investment and services**: Attention should be given to hospitals, clinics, drugs, technology relating to medical treatment activities, medical personnel, and cost. The emphasis must be on equal access to medical treatment for all Thais and the efficiency and quality of the services.

2) **Health related investment and services** : Attention should be given to activities having an impact on health, such as food safety and raw materials, cultivation of GM plants, maintenance of herbs used in the development of food and drugs.

(1.2) The government should consider the potential impact of liberalization of the health sector with the United States and should establish an FTA institution to perform the following important duties:

1) Conducting a thorough and continuous analysis of the direct and indirect impact of provisions on the public health sector.

2) Reviewing, from the legal perspective, the methods of medical treatment to protect the rights of Thais who may be affected by lawsuits resulting from the FTA, so that the Thai parties will not be at a disadvantage.

3) Studying the monitoring system, by having a strong independent regulatory body to serve as quality monitor. This must be a body that is not a stakeholder in that particular business and has state authority behind it. A regulator in the public health investment and service sector is crucial to the protection and preservation of the health benefits of the Thai people as a whole.

(2) Tourism

If tourism is going to be liberalized under an FTA, precaution must be taken regarding the probable impacts of deregulation. Efforts must be made to reserve exceptions on issues that may have long-term impacts on the country. Consideration should be given to Thailand's

environment, culture, natural resources, archeological sites, antique objects, and tourist businesses not open to foreign operators, etc.

(3) Investment

(3.1) Policy-related recommendations for negotiations on investment

1) Thailand must formulate a clear-cut economic policy before proceeding with full liberalization. Thailand can choose the kind of liberalization that is appropriate to its condition even though it cannot resist the current globalization movement. The important things are good education and the development of Thai people of good quality, who are competent, intelligent, honest, and ethical.

2) By implementing the FTA, Thailand must put itself on equal footing with United States, through a restructure of its legal and institutional framework and the establishment of a regulatory body to create a new economic structure that is capable of coping with liberalization.

3) Thailand should turn its attention to the development of regulations and legal frameworks under the WTO and should review and establish a legal framework to be prepared for international trade negotiations. In implementing an FTA with the United States Thailand has to take a serious look at its FTA policy, and link it to strengthening its internal systems to be ready for increased competition. This means systematic internal reforms that include the development of human resources, technology, money markets, and capital markets. It also means the development of laws and the policies of fair competition to prevent transnational corporations' market dominance, and the destruction of Thai businesses, especially on the issue of the U.S. model of intellectual protection, and socially sustainable development.

4) Thailand should delay the negotiations for the time being to be able to carefully scrutinize important issues and earnestly study the sectors that will be affected by FTAs, such as that about the Rules of Origin. It should assure that the treaty be appropriate for the Thai economy, so that Thailand will gain maximum benefit from FTAs. Moreover, Thailand should not agree to be bound by the treaty by signature only, but should specify that signing requires further ratification. In this way, Thailand will have the opportunity to review the text before being bound by ratification and the text can be reviewed by the Parliament and the people. Reservations should be made on important matters and consideration must given to the country's sovereignty.

5) A plan regarding the environment should be drawn up to cope with the impact of investment liberalization, in order to resolve potentially severe environmental problems.

(3.2) Preparation for systematic and appropriate liberalization

1) Reforming the legal framework relating to investment and investment measures

2) Opening service markets only in sectors where competition is beneficial to the country

3) Reforming trade-related domestic laws such as those relevant to customs duty, income taxes, procurement, standards of food and consumer products, the legal system and efficient enforcement of environmental laws, consumer protection, fair competition , state enterprise management, measures against corruption, transparency and institutions related to trade and investment.

4) Marking reservations about measures that will have an impact on the public sector and public services.

5) Not accepting the demands on intellectual property protection, especially on drug patents, disease diagnoses, and medical treatment

6) Having measures to prevent access to natural resource bases, Thai folk wisdom and biological resources.

7) Enhancing sustainable development of Thai people by means of high quality education

8) Adhering to the concept of sustainable development

5.2.4 Genetically Modified Organisms (GMOs)

(1) The government should propose as a clear-cut principle that provisions in the FTA will not impair the rights and duties of Thailand under multilateral environmental agreements to which Thailand is a member state, currently or in the future. This is to allow Thailand to fully and freely exercise the right to protect its ecosystem, health and other benefits to the public.

(2) The government should include measures that are useful for regulation and control of GMOs, especially measures provided in international agreements such as provisions on Precautionary Approach, Liability and Redress, etc. into the text of the FTA.

(3) The government should make an effort to expedite the ratification of the Biosafety Protocol, which Thailand has signed but not yet ratified. As a member state of the said Protocol, Thailand will be able to apply the Precautionary Approach to resolve problems relating to GMOs on the basis of international law. This will give Thailand more alternatives in addressing GMO-related trade disputes anticipated to increase in the future.

(4) In order to be prepared for the probable impact, Thailand should accelerate the drafting and promulgation of the bio-safety laws to give the state a legal mechanism to regulate GMOs appropriately and efficiently.

5.2.5 Biodiversity

(1) Thailand should not accept U.S. demands on the issue of plant and animal protection under the patent system. It must stand firm on the principle and the rights of WTO member states as stipulated under TRIP, which accord member states the right to deny plant and animal protection under the patent system.

(2) Thailand should insist on its rights to fulfill commitments under the convention on Biodiversity and the Biosafety Protocol. It should be clearly defined in the Thailand-United States FTA that fulfilling such commitments shall not be considered non-tax trade barriers and not acts that affect the protected investors rights under the FTA.

(3) Thailand should review the definition of the scope of investment protection, which is very broad and covers the issue of intellectual protection. In the Intellectual Property Section, the United States has expressed a demand to expand intellectual property protection. The U.S. demands in terms of investment and intellectual property will have a severe impact on Thailand's utilization of its biodiversity.