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THE BILATERAL INVESTMENT TREATIES OF SAARC AND ASEAN MEMBER STATES¹

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1. Introduction

Asian countries are parties to almost half of the world's 2676³ Bilateral Investment Treaties (BITs)⁴. Asia's appetite for investment treaties is not recent. In fact, Pakistan signed the world's first BIT with Germany in 1959. Asian countries are fast accumulating a vast collection of BITs, particularly those like China, India and South Korea, who are also aiming to protect their outward investments.

The implications of concluding BITs have also been felt by a number of Asian countries, in the form of investor-state claims under BITs. Sri Lanka faced the first publicly known investor state arbitration under a BIT in 1987⁵. As the number of investor-state claims under BITs grows, Asian countries, particularly those with weak governance structures, will be exposed to the risk of such claims. Further, the proliferation of BITs that Asian countries have concluded and continue to sign, may place critical limits on their ability to regulate foreign investors to protect public welfare. The evolving governance structures in some Asian countries make them particularly vulnerable to violating the typically broad obligations of investment protection in their BITs.

1 This paper is based on a study the author conducted for the International Institute for Sustainable Development (IISD) and United Nations Development Programme (UNDP) on SAARC and ASEAN BITs in 2006

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3 UNCTAD counted 2676 BITs at the end of 2008. Recent developments in international investment agreements (2008-June 2009) - IIA MONITOR No. 3 (2009), www.unctad.org.

4 Asia and Oceania countries account for 1112 or 41% of all BITs, UNCTAD IIA Monitor No. 3 (2009)

5 AAPL v. Sri Lanka, ICSID Reports, Vol. 4, pp. 246-319 (1993).

This paper provides an overview of the key provisions contained in over 200 BITs, signed by the regional groupings of SAARC⁶ and ASEAN⁷ (“the SAARC and ASEAN BITs” set out in Annexes 1 and 2)⁸, and discusses the constraints these may place on governments as they seek to regulate foreign investment, particularly in the current post-global economic crisis scenario.⁹

2. An Overview of SAARC and ASEAN BITs

SAARC and ASEAN countries have signed a total of approximately 443 BITs. Figure 1 shows that approximately 163 BITs have been signed by 5 out of 8 SAARC member states, 82 of which have been reviewed to support the findings in this paper (Annex 2). Out of the 8 SAARC member states, Maldives and Bhutan, have not signed any BITs.

Figure 1: SAARC MEMBER STATES' BILATERAL INVESTMENT TREATIES¹⁰				
<i>Sr No</i>	<i>Country</i>	<i>Signed</i>	<i>Entry into Force</i>	<i>First Treaty Signed with</i>
1	INDIA	63	48	United Kingdom 14-Mar-1994
2	PAKISTAN	47	21	Germany 25-Nov-1959
3	SRI LANKA	25	23	United Kingdom 13-Feb-1980
4	BANGLADESH	24	21	United Kingdom 19-Jun-1980
5	NEPAL	4	3	France 2-May-1983
6	AFGHANISTAN	3	1	Turkey 10-Jul-2004
7	BHUTAN	0	0	xxx xxx
8	MALDIVES	0	0	xxx xxx
TOTAL		166	117	
Less Intra SAARC BITs		- 3		
Net Total		163¹¹		

6 The South Asian Association for Regional Cooperation (SAARC) was established on December 8, 1985 by Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. Afghanistan joined as the eighth member of SAARC in 2007. Source: www.saarc-sec.org

7 The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967 in Bangkok by the five original Member Countries, namely, Indonesia, Malaysia, Philippines, Singapore, and Thailand. Brunei Darussalam joined on 8 January 1984, Vietnam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999. Source: www.aseansec.org

8 All the findings in this paper are based on the review of 229 BITs signed by member states of the ASEAN and SAARC regional organisations. These include 157 BITs signed by ASEAN countries and 82 BITs signed by SAARC countries, (referred to as “the ASEAN BITs” and “the SAARC BITs”) listed in Annexes 1 and 2. The total number of ASEAN and SAARC BITs takes account of 21 BITs between SAARC and ASEAN states. This report relies on UNCTAD figures, www.unctad.org

9 The findings in this paper are based on a selection of BITs, and a broader analysis may lead to different conclusions.

10 The author has relied only on data available on the UNCTAD database, other sources may indicate different figures.

11 The total takes account of 3 intra SAARC BITs.

With 63 BITs, India has the largest collection in SAARC. Pakistan ranks second with 47 BITs, followed by Sri Lanka and Bangladesh with 25 and 24 BITs each. Afghanistan and Nepal have only 3 and 4 BITs respectively. Bhutan and Maldives have no BITs.

The total number of BITs signed by ASEAN states is 301 (Figure 2), of which 157 have been reviewed in this report (Annex 1). Figure 2 (below) shows that Malaysia, the first country to sign a BIT in ASEAN, has the largest number of BITs (66) in that region. Indonesia, the second ASEAN state to sign a BIT, comes second with 60 agreements. Vietnam has 49 BITs even though it started its BIT programme in 1990. On the other hand, Brunei and Myanmar have 5 and 4 BITs respectively.

Figure 2: ASEAN MEMBER STATES' BILATERAL INVESTMENT TREATIES¹²				
<i>Sr No</i>	<i>Country</i>	<i>Signed</i>	<i>Entry into Force</i>	<i>First Treaty Signed with</i>
1	Brunei Darussalam	5	2	Germany 30-Mar-1998
2	Cambodia	16	8	Malaysia 17-Aug-1994
3	Indonesia	60	42	Denmark 30-Jan-1968
4	Lao Peoples Democratic Republic	21	17	France 12-Dec-1989
5	Malaysia	66	46	Germany 22-Dec-1960
6	Philippines	35	28	United Kingdom 3-Dec-1980
7	Myanmar	4	2	Philippines 17-Feb-1998
8	Singapore	31	23	Netherlands 16-May-1972
9	Thailand	38	32	Netherlands 06-Jun-1972
10	Vietnam	49	38	Italy 18-May-1990
TOTAL		325	238	
	Less Intra ASEAN BITs	- 24		
	Net Total	301		

BITs between Asian countries are not to their potential. There are approximately 21 BITs between SAARC and ASEAN countries. In SAARC, India and Pakistan have concluded BITs with 6 out of 10 ASEAN member states. Malaysia and Indonesia have BITs with half of the SAARC states.

There are only 3¹³ intra-SAARC BITs, compared with approximately 24 intra-ASEAN BITs.

Although China is not a member state of either ASEAN or SAARC, it has BITs with a large number of these states. China has BITs with Pakistan, Sri Lanka and Bangladesh in SAARC, although it does not have a BIT with India or Afghanistan. China has BITs with all 10 ASEAN member states.

None of the ASEAN states have a BIT with the United States (US). However, two SAARC countries (Sri Lanka and Bangladesh) have BITs with the US. The low incidence of US BITs could be due to their focus on liberalisation¹⁴ of investment. Similarly, the current Japanese BIT policy's insistence on liberalisation could be a factor in their unpopularity among ASEAN member states. Japan has BITs with Vietnam, Singapore and Laos in ASEAN. Japan has BITs with 3¹⁵ SAARC states.

3. An overview of regional investment agreements in SAARC and ASEAN

Economic cooperation between the SAARC states has remained limited. The South Asian Free Trade Area (SAFTA)¹⁶ does not include an investment protection and promotion chapter. The conclusion of a SAARC Agreement on Promotion and Protection of Investment (SAPPI) treaty has been on the agenda for some time, but is yet to make headway.

In comparison, ASEAN features greater economic integration. The ASEAN Comprehensive Investment Agreement (“the ASEAN Agreement”) was signed on 26 February 2009. The ASEAN Agreement has not been reviewed in this paper, however, Article 44 (Relation to Other Agreements) of the ASEAN Agreement. provides that the agreement shall not ‘*derogate from the existing rights and obligations of a Member State under any other international agreements to which it is party.*’ This leaves the web of BITs concluded by ASEAN states intact. Further, the broadly drafted Most Favoured Nation clause in Article 6 of the ASEAN Agreement may also allow ASEAN investors the benefit of BITs that contain higher standards of protection than those provided for in the ASEAN Agreement. The ASEAN Agreement appears to have greater safeguards for regulatory space than typical ASEAN BITs.

4. Critical concerns with respect to the reservation of regulatory space in the SAARC and ASEAN BITs

4.1 Overview

The relevant provisions of the SAARC and ASEAN BITs reviewed in this paper are discussed in general terms. However, the specific language framing the obligations in the BITs may vary leading to different legal meaning.

12 The author has relied only on data available on the UNCTAD database, other sources may indicate different figures.

13 Sri Lanka-Pakistan, Sri Lanka-India and Bangladesh-Pakistan BITs.

14 British Investment Treaties in South Asia: Current Status and Future, Dr Andrew Walter, Senior Lecturer, London School of Economics, January 2000

15 Bangladesh, Pakistan and Sri Lanka.

16 SAFTA was signed on 6 January 2004 and came into force with effect from 1 January 2006, www.saarc-sec.org

The vast majority of SAARC and ASEAN BITs adopt a typical form.

- (i) Broad definitions of what constitutes an investor and investment under the treaty
- (ii) A set of rights for investors with corresponding obligations for host states, including those on:
 - (a) national treatment (NT)
 - (b) most favoured nation treatment (MFN)
 - (c) rights to unrestricted flow of investment related funds
 - (d) Protections against expropriation without compensation,
 - (e) Compensation for losses due to civil strife and conflict
 - (f) fair and equitable treatment, and
 - (g) right to protection and security
- (iii) Limited or no Exceptions to the obligations
- (iv) The right of investors to enforce the host state's obligations before an international arbitral tribunal.

The format of the SAARC and ASEAN BITs is based on a 50 year old paradigm developed by Germany and other western European countries to protect their investors in the late 1950s. The attachment to this model is not an Asian phenomenon but a universal one. The current formulation of BITs. has been criticised for failing to balance the goals of investor protection with the need for states to effectively regulate their economies in the public interest. A frequent criticism is that the '*treatment standards are too wide and indeterminate and their interpretation has been too expansive and pro-investment*'¹⁷:

Studies by *Halle and Peterson (2005)*¹⁸ and *Cosbey (2005)*¹⁹, indicate many developing states may not have the regulatory space to undertake public interest measures in their BITs. This conclusion is supported by the analysis of the key provisions in SAARC and ASEAN BITs reviewed in this paper.

Notwithstanding the vast volumes of BITs, the majority of SAARC and ASEAN states exhibit weak capacity to determine the legal implications of signing BITs. This is not unusual as the full implications of BITs have only emerged in this millennium due to the increase in investment treaty arbitrations. This awareness has led a number of countries to review their BIT programmes, including Norway, South Africa and Ecuador. A recent position paper issued by the Government of South Africa noted that: '*There seems to have been no legal or economic analysis of the risk associated with the conclusion of BITs.*'²⁰ Indeed, it appears that a number of BITs were signed as '*photo opportunities*' or ceremonial gestures by Asian countries and elsewhere.

17 Andrew Newcombe and Lluís Paradell, *Kluwer Law International, Law and Practice of Investment Treaties Standards of Treatment*, 2009, page 63

18 UNDP Discussion Paper, *Investment Provisions in Free Trade Agreements and Investment Treaties: Opportunities and Threats for Developing Countries*, by Mark Halle and Luke Peterson (2005)

19 *International Investment Agreements and Sustainable Development: Achieving the Millennium Development Goals* by Aaron Cosbey (2005)

20 Department of Trade and Industry, Republic of South Africa *Bilateral Investment Treaty Policy Framework Review: Government Position Paper*, June 2009, Page 14

BITs are signed in the hope that the international law guarantees contained in them will attract foreign investment. However, the evidence linking foreign investment inflows and BITs appears to be weak at best. Foreign investment is motivated by a number of factors, of which legal protection is but one element. At the same time, the risks associated with BITs have become prominent in the rise of expensive investor-state treaty arbitrations. The expense of responding to an investor-state arbitration can be high, not only because of the potential damages but a state may also have to bear the costs of legal advice to defend an unsuccessful investor claim. For example, in *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*²¹, the tribunal dismissed the case for lack of jurisdiction, but nonetheless ordered that each party pay their own costs.

Figure 3 shows that there are 20 known investor-state arbitrations against 4 SAARC states (India, Pakistan, Bangladesh and Sri Lanka). While ICSID is not the only place that investment claims are arbitrated, it is the only forum obliged to make the registration of such a claim public.

Figure 3: Known Investor-State Arbitrations Against SAARC Countries²²					
Sr No	Country	Pending	Concluded	Total ICSID	Total Non ICSID
1	INDIA	0	0	0	9
2	PAKISTAN	1 ²³	4 ²⁴	5	0
3	SRI LANKA	1 ²⁵	2 ²⁶	3	0
4	BANGLADESH	1 ²⁷	2 ²⁸	3	0
5	NEPAL	0	0	0	0
6	AFGHANISTAN	0	0	0	0
7	BHUTAN	0	0	0	0
8	MALDIVES	0	0	0	0

21 ICSID CASE NO. ARB/00/2, www.worldbank.org/icsid

22 Figures compiled by the author based on research on ICSID <http://www.worldbank.org/icsid/cases> and UNCTAD

23 Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29)

24 (i) Impregilo S.p.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/02/2) (ii) Occidental of Pakistan, Inc. v. Islamic Republic of Pakistan (ICSID Case No. ARB/87/4 (iii) SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13) (iv) Impregilo S.p.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3)

25 Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/09/2)

26 (i) Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/00/2) (ii) Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/87/3)

27 Chevron Block Twelve and Chevron Blocks Thirteen and Fourteen v. People's Republic of Bangladesh (ICSID Case No. ARB/06/10)

28 (i) Scimitar Exploration Limited v. Bangladesh and Bangladesh Oil, Gas and Mineral Corporation (ICSID Case No. ARB/92/2) (ii) Saipem S.p.A. v. People's Republic of Bangladesh (ICSID Case No. ARB/05/7)

TOTAL CASES AGAINST SAARC	3	8	11	9
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Figure 4 shows, 7 investor-state arbitrations have been registered against the 3 ASEAN member states of Malaysia, Indonesia and Philippines at ICSID. There is also a non-ICSID investor – state arbitration against Myanmar. The largest number of claims is incidentally against Malaysia, which also has the largest number of BITs in ASEAN. One possible explanation for the relatively smaller number of claims against ASEAN members in comparison with SAARC could be because of the requirement for registration or specific approval for the investment in a large number of ASEAN BITs.

Figure 4: Investor-State Arbitrations against ASEAN Member States²⁹					
Sr No	Country	Pending	Concluded	Total ICSID	Total Non-ICSID
1	Brunei Darussalam	0	0	0	0
2	Cambodia	0	0	0	0
3	Indonesia	0	2 ³⁰	2	0
4	Lao Peoples Democratic Republic	0	0	0	0
5	Malaysia	0	3 ³¹	3	0
6	Philippines	1 ³²	1 ³³	2	0
7	Myanmar	0	0	0	1 ³⁴
8	Singapore	0	0	0	0
9	Thailand	0	0	0	0
10	Vietnam	0	0	0	0
TOTAL CASES AGAINST ASEAN		1	6	7	1

⁷³⁵ ASEAN states and 5 SAARC³⁶ have signed the ICSID Convention. Notably, India is not a signatory to the ICSID Convention.

²⁹ Source: Figure compiled by the author from data at www.worldbank.org/icsid

4.2 Preamble

Recent investment treaty jurisprudence has shown that the preamble can play a significant role in the interpretation of the treaty. Recent BITs such as those of the US and Canada, incorporate broader objectives in their preambles, rather than a singular focus on investment protection found in the typical BIT formulation.

SAARC

Most of the SAARC BITs reviewed in this paper (approximately over 60%) limit themselves to the encouragement and protection of investment and economic cooperation. However, a small number (approximately 12%) contain references to '*economic development*' in their preambles. For example, the India-Australia and Pakistan-Australia BITs '*recognise the importance of promoting the flow of capital for economic activity and development and aware of its role in expanding economic relations*'.

Overall, the SAARC BITs limit themselves to investor protection and economic cooperation goals, and lack the broader objectives found in the preambles of more recent BITs

ASEAN

The vast majority of the ASEAN BITs (over 60%) aim to create "*favourable conditions for investment*" and in the same manner as the SAARC BITs, recognise that "*encouragement and reciprocal protection under the agreement will be conducive to the stimulation of business initiatives and will increase prosperity in both countries*".

Brunei's BITs explicitly recognise the importance of the transfer of technology and the human resource development that arises as consequence of investment. A small number of the ASEAN BITs (approximately 5%) refer to economic development objectives.

The focus on the quality of investment is worthy of note in the preamble of the Singapore-Netherlands BIT, which provides for the '*encouragement of investments on the basis of quality in order to develop the industrial and commercial activities of their countries*'.

30 (i) Amco Asia Corporation and others v. Republic of Indonesia (Case No. ARB/81/1) (10) (ii) Cemex Asia Holdings Ltd v. Republic of Indonesia (Case No. ARB/04/3) (49)

31 (i) Philippe Gruslin v. Malaysia (Case No. ARB/94/1) (30) (ii) Philippe Gruslin v. Malaysia (Case No. ARB/99/3) (62) (iii) Malaysian Historical Salvors, SDN, BHD v. Malaysia (Case No. ARB/05/10) (77)

32 Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (ICSID Case No. ARB/03/25)

33 SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (Case No. ARB/02/6) (14)

34 Yaung Chi Oo Trading Pte Ltd v Myanmar, Award, ASEAN Case No ARB/01/1; IIC 278 (2003); 42 ILM 540 (2003)

35 Brunei Darussalam, Cambodia, Indonesia, Malaysia, Philippines, Singapore and Thailand are member states of the ICSID Convention. Burma (Myanmar), Lao and Vietnam are not signatories to the ICSID Convention.

36 Pakistan, Afghanistan, Bangladesh, Nepal and Sri Lanka.

A broader range of objectives is also present in a few of the recent ASEAN BITs. For example, the Vietnam-Japan BIT (2003) acknowledges that the objectives of the treaty can be achieved without restricting policy space on health, safety and environmental matters. Similarly, the Singapore-Jordan BIT (2004) states that the treatment accorded to investments serves to stimulate the flow of capital and the economic development of both states. Similar clauses are found the Netherland's BITs with Lao (2003) and Cambodia (2003).

A few older BITs, for example Thailand's BITs with Lao (1990) and Vietnam (1991), also refer to the promotion of progressive development for the well being of the people. Similarly, Australia's BITs with the Philippines (1995), Lao (1994) and Indonesia (1992) refer to the recognition that the flow of capital for economic activity and development.

The bulk of both ASEAN and SAARC BITs do not contain an explicit reference to development objectives. Only a small number refer to development-oriented broader objectives in their preambles, tilting the balance in favour of investor protection where there is ambiguity in the text of the treaty.

4.3 Definition of Investment

The definition of the term '*investment*' is critical because only investments falling within the scope of the particular BIT will form the basis of a claim under that treaty. All of the ASEAN³⁷ and SAARC BITs define investment in a broad, non-exhaustive manner to mean either '*every kind of asset*' or '*every kind of investment*'. These general definitions are illustrated by non-exhaustive lists of examples, including movable and immovable property; participation in companies; claims to money; rights to performance; intellectual and industrial property rights and concessions or similar rights. A few ASEAN BITs, also extend coverage to leased goods in certain circumstances³⁸. Returns on the investment are also offered varying degrees of protection.

A broad definition of investment in BITs is necessary to an extent to reflect the commercial reality of the different forms capital can take today. However, from the perspective of a capital importing country, it is important to ensure that the precious benefits of its investment treaty programme are enjoyed by investments that a host state wishes to attract. For example the open asset-based definition of investment was replaced by a comprehensive, but finite, meaning of investment in the updated model Canadian FIPA. Similarly, the definition of investment in the US Model BIT (2004) includes a requirement that the assets exhibit the characteristics of an investment. Recent treaties also contain exclusions of investor interests such as sales of goods contracts or sovereign debt from the scope of the definition of investment.

A large number of ASEAN BITs (over 50) expressly provide that the investment must be duly registered or specifically approved in writing to enjoy protection of the BIT. A smaller number of SAARC BITs also contain a similar requirement. The majority

37 Except the Thailand-Egypt BIT defines this as all kinds of investments, money and assets. Similarly, the Thailand-Netherlands BIT does not define investment but refers to investments, goods and rights

38 For example, Finland-Vietnam BIT

of the BITs signed by Thailand, Singapore, Malaysia and Philippines reviewed in this paper reflect this approach.

The requirement that the investment is specifically approved in writing and registered by the host state provides the latter with a list of investments that have the benefit of the protections in the agreement thereby reducing risks of inadvertent non-compliance.

4.4 Definition of an Investor

A frequent objection to jurisdiction in investor-state arbitrations concerns whether a claimant is an ‘investor’ within the meaning of the BIT. The investors in the SAARC and ASEAN BITs, reviewed comprise of both natural and juridical persons.

Determination of the nationality of natural person is left to each state’s domestic law. A small number of ASEAN and SAARC BITs also cover permanent residents in addition to nationals.

The vast majority of ASEAN and SAARC BITs reviewed in this paper do not require that juridical persons are controlled by citizens of the home state or a connection with the home state beyond the fact of incorporation or registration. However, a small number of ASEAN and SAARC BITs require that the investor should actually be doing business;³⁹ be managed out of the home state;⁴⁰ have real or effective economic activities;⁴¹ in the home state; or that nationals of the home state have a substantial interest in the company registered or incorporated therein⁴². This is designed to prevent ‘*treaty shopping*’ where citizens of a third state can effectively benefit from the BIT’s protection by incorporating a company in the state party, even though their commercial activities have no real connection to that state. Thus, investors can find home states of convenience where they have minimal obligations under the laws of the state in question, but maximum benefits under a BIT.

4.5 Right to establish investments

The typical approach in the ASEAN and SAARC BITs is to provide only post-establishment rights to investment, that is, the protections in the BIT only apply once the investment is made in accordance with its host state laws. Only a handful of SAARC and ASEAN BITs reviewed in this paper create rights for the investment in the pre-establishment phase (“pre-establishment rights”). In SAARC, the Bangladesh-US and Sri Lanka-US BITs provide investments with national treatment and most favoured nation treatment at the pre-establishment phase. Japan’s BITs with Bangladesh and Sri Lanka include an obligation to provide investment with most

39 For example, Philippines-Netherlands, Philippines-Argentina, Philippines-Portugal and Philippines-Bangladesh BITs

40 For example, Indonesia-Spain, Myanmar-Philippines, Philippines-Korea and Brunei-China BITs

41 For example, Indonesia-Morocco, Indonesia-Romania, Indonesia-Chile, Philippines-Australia, Philippines-Czech Republic, Philippines-Germany, Philippines-Bangladesh, Philippines-Myanmar, Thailand-Croatia, Thailand-Russia, Vietnam-Romania and Vietnam-Chile BITs

42 For example, the Indonesia-Denmark BIT

favoured nation treatment at the pre-establishment phase. In ASEAN, the Vietnam-Japan BIT contains pre-establishment rights, however, sectors are excluded in an annex on a negative list basis.

The ASEAN Agreement provides for national and most favoured nation treatment in the pre-establishment phase of the investment subject to certain reservations set out in the agreement.

The ability of a host state to manage the establishment of investments in its economy is an important regulatory function, which states are often reluctant to relinquish under the terms of a treaty. SAARC and ASEAN states typically reserve the ability to regulate the establishment foreign of investments by providing that the admission of investment be subject to the host states laws.

4.6 Fair and Equitable Treatment

In a study reviewing 19 awards against host states, the state was sanctioned for unfair or inequitable treatment or for a failure to provide full protection and security in 13 cases⁴³. The fair and equitable treatment obligation has emerged as a potent tool for investors in investment treaty arbitrations.

The vast majority of SAARC BITs reviewed in this paper (89% approximately) and ASEAN BITs (approximately 98%) contain an obligation to accord investments by investors '*fair and equitable treatment*'. Among the SAARC BITs reviewed in the paper, India appears to have the highest incidence of fair and equitable treatment in its BITs. The vast majority of BITs signed by Nepal, Pakistan, Bangladesh's and Sri Lanka's BITs also contain this provision.

Among the ASEAN BITs, the Brunei, Cambodia, Lao, Myanmar and Vietnam BITs reviewed in this paper include fair and equitable treatment provisions. However, in a few instances slight variances in terminology, such as "*equitable treatment*" or "*equitable and reasonable treatment*" can be found.

The precise scope of the fair and equitable treatment BITs is presently uncertain. The core issue is whether the standard to be applied is that of customary international law or an independent standard. Even in cases, where the treaty makes reference to the customary international law standard, the evolution of customary international law from the 1920s cases such as *Neer*⁴⁴ is a topic of much debate. Most of the ASEAN and SAARC BITs reviewed in this paper do not specify the standard to be applied to the fair and equitable provision leaving this to be determined by the tribunal. However, a few ASEAN BITs state that fair and equitable treatment should not be less than that accorded to a third state's investment. Similarly, a small number of the SAARC BITs⁴⁵ provide that the fair and equitable treatment shall not be less favourable than that accorded to the host state's own nationals or to any from a third state.

43 A return to the Gay Nineties? The Political Economy of Investment Arbitration, Gus Van Harten, Law Department, LSE, April 2006

44 LFH *Neer & Pauline Neer (USA) v United Mexican States* (1926) IV RIAA 60

45 For example, Korea-Bangladesh, India-Denmark and India-Korea BITs.

This obligation requires a realistic assessment of the capacity of governance in the SAARC and ASEAN states to meet international standards. The issue for developing states is whether their legal, administrative and political environments meet the international standards of fair and equitable treatment particularly in terms of transparency and predictability. This is important because the price of non – compliance in investor – state arbitration is often high.

4.7 Full protection and security

The majority of SAARC (approximately 70%) and ASEAN BITs (over 64%) reviewed in this paper provide investments with protection and security in the host state. Among the SAARC countries, Bangladesh’s BITs appear to have the highest incidence of this provision, (in approximately 90%), whereas in the remainder of the SAARC countries its appearance averages from 58% to 75%. There are also variations and at times this standard is expressed as ‘*full protection and security*’, ‘*adequate protection and security*’, ‘*physical security and protection*’ or simply ‘*protection*’ and/or ‘*security*’.

The full protection and security obligation appears in approximately 42% and adequate protection and security in 22% of the ASEAN BITs reviewed in this paper.

As discussion in the section on fair and equitable treatment, the obligation to provide ‘*full protection and security*’ in the majority of the BITs reviewed in this paper is not qualified by reference to the minimum standards of international law, leaving it for the tribunals to apply a meaning to this term. Although the decisions of other tribunals on this standard are not binding, these are likely to influence interpretations in future cases. Investment treaty tribunals have found breaches of the full protection and security obligation in situations where the host state failed to take reasonably expected protective measures to prevent the physical destruction of the investor’s property. For example, in *AAPL v. Sri Lanka*⁴⁶, Sri Lankan security forces destroyed the investor’s shrimp farm and killed more than 20 of its employees to try and curb the Tamil insurrection. On the basis of the full protection and security clause in the UK-Sri Lanka BIT, the tribunal held that Sri Lanka had violated this obligation by not taking all possible measures to prevent the killings and destruction of investment. This standard has found application in situations beyond the physical protection of property. For example, in *Goetz v. Burundi*⁴⁷, the tribunal held that the withdrawal of a government authorisation vital to the operation of the project may breach the standard.

The trend in recent BITs is to define the full protection and security standard to be no greater than the minimum customary international law standard.

4.8 National Treatment and Most- Favoured Nation Treatment

The obligation to provide investments national treatment and most favoured nation treatment are typical provisions in BITs and are also a common feature in the SAARC BITs and ASEAN BITs.

46 *AAPL v. Sri Lanka*, ICSID Award of June 27, 1990

47 *Antoine Goetz et consorts v. République du Burundi*, Sentence du CIRDI du 10 Février 1999

4.8.1 National treatment

National treatment provisions impact upon a state's ability to undertake policies that provide preferential treatment to its nationals over foreign investors. It is important for a state to reserve policy space as discrimination, particularly in favour of nationals belonging to certain disadvantaged areas, sectors or groups, may be necessary at times.

Approximately 73 % of the SAARC and 39% of the ASEAN BITs reviewed in this paper contain 'national treatment' provisions.

Among the reviewed SAARC BITs India appears to always include national treatment provisions, followed by Bangladesh, which has a high incidence of this provision in its BITs (approximately 90%). Pakistan, Sri Lanka and Nepal include this provision in the range of 58% to 68%.

Among the reviewed ASEAN BITs, the Indonesian BITs have the lowest incidence of the national treatment provisions (approximately 12%), whereas these are present in 84% of the Thai BITs reviewed. The inclusion of national treatment in the remainder of the ASEAN states' BITs averages from 33% to 50%⁴⁸.

The protocols to the German BITs in SAARC and ASEAN⁴⁹ typically elaborate that '*treatment less favourable*' shall be deemed to include unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. This can restrict states from taking policies to encourage a particular local industry. However, Thailand's BITs exclude those that are considered '*promoted*' persons from the most favoured nation and national treatment clauses.

There is limited reservation of sectors, measures or activities in the reviewed BITs from the scope of the national treatment clause. There is also no reference to the test of 'like circumstances' to be applied when comparing national and foreign investors.

4.8.2 Most Favoured Nation Treatment

Approximately 98% of the SAARC BITs and all of the ASEAN BITs reviewed in this paper include a most favoured nation (MFN) treatment provision. However, in a few of the ASEAN and SAARC BITs, the MFN provision applies only with respect to fair and equitable⁵⁰ and protection and security treatment⁵¹.

The MFN provision is a typical feature of BITs, but has become controversial due to the decisions of some tribunals that have allowed investors an opportunity to "cherry-

48 Myanmar is excluded from the analysis.

49 The German BITs with the ASEAN states of Cambodia, Indonesia, Malaysia, Philippines, Singapore and Thailand

50 For example, Pakistan-Turkmenistan (Article 3)

51 For example, China-Brunei, Cambodia-Thailand, Indonesia-Belgium, Lao-Denmark, Malaysia-Denmark, Philippines-Denmark, Thailand-Cambodia and Vietnam-China BITs

pick” from any and all international investment rules or domestic laws available to any foreign investor. Further the *Maffezini (Arg.) v. Kingdom of Spain*⁵² tribunal found a broad most-favoured-nation clause in an Argentina-Spain BIT to encompass international dispute resolution procedures⁵³. The result has been growing uncertainty for host states as to what their obligations are under an agreement, and opportunities for an expansive reading of existing agreements by arbitrators.

Nearly all of the ASEAN and SAARC BITs reviewed in this paper contain exceptions for privileges granted to investors of third states due to a customs union, a regional integration treaty or a free trade agreement (FTA) or pursuant to a double taxation convention or other agreements regarding matters of taxation.

The German BITs in the ASEAN and SAARC typically contain an exception to MFN and NT provisions for measures that have to be taken for reasons of public security and order, public health or morality. However, the SAARC and ASEAN BITs reviewed typically have broad MFN clauses that are vulnerable to expansive interpretations by tribunals.

4.9. Exceptions

There are few BITs in the SAARC and ASEAN BITs reviewed in this paper that contain reservations of the right to regulate. The BITs signed by India and Singapore typically contain a general exception to take measures in a limited set of circumstances. The benefit of these exceptions appears to be limited as they contain an exhaustive list of circumstances, and also place the burden of proof on the host state.

The Indian BITs employ a general exception⁵⁴ in their texts. For example, the India-German BIT provides, ‘*Nothing in this Agreement shall prevent either Contracting Party from applying prohibitions and restrictions to the extent necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animal or plants.*’ A different version also appears in the reviewed Indian BITs providing that ‘*Nothing in this agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis.*’⁵⁵

A few of the reviewed Singapore’s BITs⁵⁶ mirror the first Indian approach, however, the country’s recent BIT with Jordan (2004) contain more detail⁵⁷

52 Emilio Agustín Maffezini v. Kingdom of Spain (ICSID CASE NO. ARB/97/7), Source: www.worldbank.org/icsid

53 See Decision on Jurisdiction 38-64 (Jan. 25, 2000), reprinted in 16 ICSID Rev. – F.I.L.J. 212 (2002)

'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination, between the Parties where like conditions prevail, or a disguised restriction on investments in the territory of a Party by investors of the other Party, nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party of measures:

- (a) necessary to protect public morals or to maintain public order⁵⁸;*
- (b) necessary to protect human, animal or plant life or health;*
- (c) necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Treaty including those related to:*
 - (i) the prevention of deceptive and fraudulent practices to deal with the effects of fraud on a default of contract;*
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and protection of confidentiality of individual records and accounts;*
 - (iii) safety;*
- (d) imposed for the protection of national treasures of artistic, historic or archaeological value;*
- (e) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;⁵⁹*

The approach in the Singapore – Jordan BIT is inspired from GATT and WTO trade law, and requires a much deeper analysis of its application in the investment context, than can be done at present. Similarly, The Japan-Vietnam BIT also adopts a GATS type general exception.

It is interesting to note that Singapore's BITs with the Netherlands (1972), United Kingdom (1975) and Germany (1973) contain no such general exceptions. This could be interpreted to mean that Singapore developed more sophisticated negotiating capability in 1980s or that it did not have sufficient negotiating strength at the time or a combination of both factors. Another explanation may be because of the fact that investment treaty cases had not materialised at this time and therefore the need to introduce these safeguards was not fully apparent.

54 All of the Indian BITs reviewed by the in this paper contain a general exception.

55 This clause also appears in India's BITs with United Kingdom, Sri Lanka, Oman, Sweden, Thailand and Egypt.

56 The Singapore-China, Singapore-Vietnam, Singapore-Pakistan, Singapore-Czech Republic, Singapore-Mongolia, Singapore-Egypt, Singapore-Mauritius and Singapore-Cambodia BITs

57 Footnote to Article 4 (Expropriation) in the Singapore-Jordan BIT refers to letters of exchange on indirect expropriation, however, this has not been considered as this document was not available on the UNCTAD treaty database and through other internet search attempts.

58 The public order may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society

59 Article 18 of the Singapore-Jordan BIT

The investment chapter in the India-Singapore CEC is novel because it does not include any provisions for MFN nor provisions for “Fair and Equitable Treatment” or “Full Protection and Security” – a notable omission at a time when an increasing number of investment treaty decisions have left the scope of these obligations uncertain. This reflects an alternative approach omitting the standards that are uncertain in the treaties rather than a reliance on the exceptions clauses alone for the reservation of policy space. The India-Singapore CEC also incorporates a general exception designed to safeguard legitimate public welfare measures.⁶⁰

Reservations of the right to regulate are required to preserve policy space. The majority of the SAARC and ASEAN BITs have critical reservations missing, including those for the protection national security interests, public health and safety, and the environment. The full implications of a limited GATS type general exception contained a few recent BITs are yet to be tested in the investment context.

4.10 Compensation for Expropriation

The obligation of a state to compensate investors in the event of an expropriation is a common provision in BITs. All of the SAARC and ASEAN BITs reviewed in this paper contain this obligation.

‘*Expropriation*’ is interpreted to include both direct and indirect takings. Government measures such as tax increases, environmental regulations or the revocation of a license may, in certain circumstances, may amount to an expropriation if there is an impact on the value of the investment. The critical issue is whether regulatory measures taken in the public interest that have an impact on the value of an investment are an expropriation and therefore require the state to compensate the investor. The decision in the *Methanex v. United States*⁶¹ under NAFTA focused on the purpose of the regulatory measure involved in that case – an environmental protection measure – as a basis for excluding it from the scope of what could be considered as an expropriation. There are also decisions adopting a contrary view, for example, the *Metalclad*⁶² line of reasoning. This reflects the current uncertainty relating to public interest regulatory measures and the violation of the expropriation clause. This has prompted adjustments in the Canadian and US Model texts to carve out regulatory measures.

The SAARC and ASEAN BITs reviewed in the paper do not include language that specifically addresses the issue of regulatory expropriations. However, a few of the BITs discussed above do contain a limited general exception to take public welfare

60 India-Singapore FTA inked, investment provisions include important innovations, By Luke Eric Peterson, INVEST-SD: Investment Law and Policy News Bulletin, August 3, 2005, Published by the International Institute for Sustainable Development, (<http://www.iisd.org/investment/invest-sd/>)

61 *Methanex Corporation v. United States of America*, In the Matter of An Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Final Award of the Tribunal, August 7, 2005. Available at http://www.naftaclaims.com/disputes_us_6.htm.

62 *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000

measures. The majority of the remaining SAARC and ASEAN BITs reviewed do not even contain such a limited exception.

Prohibiting expropriation without compensation is standard practice in BITs; however it is important that the treaty is drafted to preserve adequate policy space for states to take measures for the public good without it being deemed an expropriation.

4.11 Repatriation of Investment and Returns

The reviewed SAARC and ASEAN BITs typically contain an obligation for the host state to permit transfers related to investment to be made freely and without delay into and out of its territory (although the majority in ASEAN contain certain qualifications). The vast majority of SAARC BITs do not provide any safeguards for a difficult balance of payments situation. However, limited safeguards are found in a few of the SAARC BITs, particularly in those signed by Sri Lanka, which allow the host state to restrict transfer in exceptional financial and economic circumstances. Bangladesh also includes this exception in a few of its BITs. However, the Indian and Pakistani BITs reviewed in this paper do not provide any safeguards to this obligation.

The ability of host states to restrict transfers even in situations of economic collapse or balance of payments difficulties is not found the majority of the reviewed SAARC BITs. The inability to control foreign currency inflows and outflows may leave developing states vulnerable to swings in its foreign exchange reserves. For example, out of the 3 BITs signed by Nepal, only its BIT with Germany provides a limited exception to this obligation.

An interesting feature in the majority of the reviewed ASEAN BITs is that the obligation to allow repatriation of funds is made subject to the host state's laws and regulations.

Only a small number of ASEAN BITs provide an exception to this obligation for a difficult balance of payment situation or exceptional economic or financial circumstances. Thus, nearly half of the ASEAN BITs do not contain any exception to restrict transfers in a difficult balance of payments situation nor do they make this obligation subject to local laws and regulations.

4.12 Investor-State Dispute Resolution

A unique feature in BITs is the ability of private investors to take direct legal action against a state for the breach of a host state's obligation in the agreement. Treaties typically provide for dispute resolution between state parties, not for private individuals against states.

Nearly all of the SAARC BITs (approximately 95%) and ASEAN BITs (approximately 92%) reviewed contain investor-state dispute resolution clauses. A few of these clauses, restrict the scope of the investor-state arbitration. The Chinese BITs reviewed in this paper typically limit the arbitration clause to matters relating to compensation for expropriation. However, China's recent BITs, including its treaty with Brunei (2000), do not have this restriction and provide recourse to arbitration for all investment disputes.

The majority of the reviewed SAARC and ASEAN BITs provide for ICSID arbitration, although *ad hoc* arbitration under UNCITRAL rules is also typically provided as an option. The vast majority of the ASEAN and SAARC reviewed in this paper do not contain an obligation to exhaust local remedies before seeking international arbitration. This means that investors can access international arbitration directly without giving the domestic process a chance.

The SAARC and ASEAN BITs typically omit detail on the composition and conduct, including transparency, of the arbitral process. The trend in recent agreements is to include such the detail, for example the US Model BIT and the ASEAN Agreement.

4.13 Duration and Termination

All of the SAARC and ASEAN BITs reviewed in the paper contain a duration and termination clause. The typical duration of the ASEAN and SAARC BITs is typically 10 years (although some extend to 15 or 20 years), with the term automatically extending thereafter until one party terminates the agreement by giving notice. The standard notice period is 1 year (although some BITs provide 6 months). This means that states have the unilateral option to terminate these BITs upon expiry of the initial term. This gives states the option to terminate the existing BIT and commence negotiations for a new agreement that strikes a better balance between investor protection and their development needs.

The recent vintage of most BITs, especially those signed in the 1990s, means there is little experience with the termination of BITs. However, the recent increase in BIT arbitration and the growing criticism of their negative implications for development has led some states to terminate existing BITs. For example Ecuador terminated 9 BITs last year. Investments made prior to the termination are typically protected for a period of 10 years after the termination in the SAARC and ASEAN BITs reviewed. The post – termination cover provided to existing investments limits the flexibility for the government to change policies to respond to a dynamic world.

5. Conclusion

The 50 year old model followed by most BITs is inadequate for the emphasis placed on investment for development in the 21st century. The vague and broad obligations; the absence of the link between investment and development; the non- preservation of a state's ability to regulate its economy are frequent criticisms of this template. Therefore, SAARC and ASEAN states following older BIT models may wish to reconsider their approach. The absence of safeguards to reserve policy space in the vast majority of the SAARC and ASEAN reviewed in this paper shows a lack of understanding of the full implications of the BITs. While countries such as India and Singapore preserve some policy space in their BITs, this practice is not prevalent in the vast majority of SAARC and ASEAN BITs. It is also striking to note that those with relatively sophisticated models are India and Singapore- the more developed economic leaders in their respective regional blocs.

As awareness of the flaws in the present model grows, this is an opportune time to usher the SAARC and ASEAN BIT programmes in a new direction. A number of countries have embarked upon a review of their BIT programmes. Examples of how the ASEAN and SAARC BITs can be improved include clarifying the scope of the treaty; structuring the obligations with greater precision to reduce vagueness; expressly allowing national policy space for a host state to take measures required to protect public interest; introducing a balance between investor rights, home and host state obligation, and introducing a more transparent, legitimate and accountable dispute resolution system.

This needs to be accompanied by the building of capacity in the governments and civil society of SAARC and ASEAN states to understand the international law controls BITs can place on a state's regulatory ability.