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The Economic Co-Operation Agreement between Canada and ASEAN: Charting a Foreign Investment Course in Southeast Asia

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THE ECONOMIC CO-OPERATION AGREEMENT BETWEEN CANADA AND ASEAN: CHARTING A FOREIGN INVESTMENT COURSE IN SOUTHEAST ASIA

I. INTRODUCTION

In September 1981 Canada and the Association of Southeast Asian Nations (ASEAN) signed the first economic co-operation agreement between ASEAN and an individual country.[1] The Agreement is indicative of the changing focus in Canadian international economic relations towards the Pacific area. It also underlines Canadian recognition of an important new regional organization whose member countries contain some of the world's fastest growing economies. In this discussion it is proposed to examine the Agreement against the international legal framework for economic relations between states, assess its overall effectiveness in that context and explore where new initiatives are still needed.

II. ASEAN

ASEAN consists of six Southeast Asian countries: Thailand, Malaysia, Singapore, Indonesia, the Philippines and Brunei. These countries have a population of over 270 million and a Gross Domestic Product around U.S. $200 billion. During the 1970s the ASEAN countries were the fastest growing in the world with growth rates between six and nine per cent — compared with Canada's 3.9. It is the potential that this continued growth, or even something close to it, represents for Canadian trade and investment in the region that forms the political and economic background to the Agreement.

ASEAN was founded in August 1967 as a political grouping with the aim of maintaining peace and security in the region.[2] Between 1967 and 1975 it was a relatively inactive body. This period of

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1 *Agreement Between the Government of Canada and the Governments of the Member Countries of the Association of South East Asian Nations on Economic Cooperation,* New York, 25 September 1981; in force 1 June 1982 (hereinafter called "the Agreement").

2 See *Text of Asean Declaration Signed by the Five Asean Countries in Bangkok on 8 August 1967,* in D. Crone, THE ASEAN STATES: COPING WITH DEPENDENCE (1983) Appendix A.

atrophy (which coincided with the Vietnam war and its aftermath) ended in 1976.

At the first meeting of ASEAN heads of government on Bali in 1976, two important agreements were signed: the Treaty of Amity and Co-operation in South East Asia (open to accession by other countries in the region) and the Declaration of ASEAN Concord, which undertook an expansion of economic, social, political and cultural co-operation amongst members.[3]

Co-operation between ASEAN countries on political matters has been matched by economic and legal co-operation as well. In 1977 ASEAN members signed the Preferential Trading Arrangement (PTA) whereby they agreed that tariff preferences negotiated on a multilateral or bilateral premise between themselves be extended to all ASEAN states on a most-favoured-nation basis.[4] The ASEAN Committee on Trade and Tourism is to conduct trade negotiations within the framework of the PTA. The PTA only applies to trade in goods between ASEAN countries. The presence of a country like Singapore, with few tariffs, makes concessions granted by other ASEAN members less meaningful.

An ASEAN Industrial Joint Ventures Agreement was set up in 1983. Under its terms, private investors from at least two ASEAN nations may invest in a joint venture within ASEAN. If a project meets with ASEAN approval the exports of the joint venture will be entitled to a fifty per cent reduction in tariffs by participating importing countries. There have been other attempts to co-ordinate economic developments between ASEAN members, such as the ASEAN Industrial Projects and the ASEAN Industrial Complementation Projects. Progress under these umbrella agreements has been spotty with some projects being dropped and others proceeding.[5] The Agreement, in Article VIII, specifically refers to the possibility of Canadian participation in such regional projects.

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[3] See *Text of the Treaty of Amity and Cooperation in Southeast Asia* and *Text of the Declaration of Asean Concord Signed by the Five Asean Heads of States in Bali on 24 February 1976*, *id.*, Appendices C and B.

[4] See *Text of the Asean Preferential Trading Arrangements signed by the Five ASEAN Foreign Ministers in Manila on 25 February 1977*, *id.*, Appendix D; Tan, *Intra-ASEAN Trade Liberalization: An Empirical Analysis* (1982) 20 J. OF COMMON MKT. STUD. 321. The PTA was facilitated by a GATT waiver pursuant to the Protocol relating to Trade Negotiations among Developing Countries: see GATT, 18th Supp. BISD 26 (1971).

[5] See M. Arrif, *The Development of the ASEAN Industrial Projects: Studies on Regional Co-operation in the Fields of Industry*, I.D./U.N.I.D.O./I.S./281, 25 January 1982.

There have been several attempts within ASEAN to establish uniform laws on certain matters besides tariffs. A committee has been established to examine national tax incentives and to examine means of rationalizing the present system. The ASEAN Society of Accountants is attempting to develop common accounting standards for the countries of the region. In 1979, the ASEAN Group of Experts proposed a uniform ASEAN law on patents.[6]

III. THE AGREEMENT

The history of the present Agreement began in 1976 with the formation of the ASEAN-Ottawa Committee. The Philippines was the country designated by ASEAN to co-ordinate relations between that organization and Canada. The Philippines also co-ordinates the ASEAN-U.S. relationship. Under the aegis of the ASEAN-Ottawa Committee meetings were held which have led to economic development assistance in the form of two major development projects.[7] The Committee also provided Canada with the status of an ASEAN dialogue partner thus enabling it to participate in the annual post-ministerial meetings of ASEAN foreign ministers. The other ASEAN dialogue partners are Japan, Australia, New Zealand, the EEC and the United States. In 1980 the Secretary of State for External Affairs, the Honourable Mark MacGuigan, suggested that Canada and ASEAN conclude an industrial and technical co-operation agreement. In the discussions which followed, the scope of the Agreement was expanded to include co-operation in commercial matters. The outcome of these negotiations was the 1981 Agreement.

The Agreement is characterized by its high level of generality. The Agreement does not contain detailed provisions on specific aspects of Canada-ASEAN economic relations. This reflects the fact that this relationship has little historical content. Though several ASEAN countries are members of the Commonwealth, Canada has no history of playing an active role in Southeast Asian affairs. The new Agreement represents an expectation of greater economic involvement in the future. Meanwhile, uncertainty as to the form such involvement might take partly explains the vague language of the Agreement.

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[6] See D. Allan, A. Farran and M. Hiscock, *Institutional Co-operation in Asia and the Pacific*. Paper delivered to 11th International Trade Law Seminar, Australian Academy of Science, Canberra, November, 1984.

[7] These projects were a Forest Tree Seed Centre and the Fisheries Post-Harvest Technology Project. See *Note*, (1982) 20 CAN. Y.B. INT'L L. 347.

The Agreement consists of five parts. Part One relates to industrial co-operation and, consistent with the facilitative nature of the whole arrangement, avoids specific undertakings in exchange for mutual pledges to work towards new bilateral and inter-agency agreements, as well as joint ventures and technology transfers. The initial focus of the Agreement is on expanding both public and private investment rather than trade opportunities. Part Two deals with commercial co-operation and contains a most-favoured-nation standard (Article V) for products of the parties. The development needs of the ASEAN countries are also recognized in terms of a reference to market access in Article VIII. Part Three is the last substantive part of the Agreement and deals with development co-operation and contains undertakings by Canada to co-operate on ASEAN regional development projects as well as consider providing technical and financial support.[8] Part Four deals with related agreements and institutional arrangements. Under Article XVII of the Agreement, a Joint Co-operation Committee is established to promote and review the various co-operation activities envisaged under the Agreement.[9] The Committee is to meet annually. In addition, the parties are obliged to consult, upon request, on individual subjects.[10] Part Five of the Agreement deals with the territorial application of the Agreement, its duration and amendment procedures.[11]

IV. THE BACKGROUND TO THE AGREEMENT

The general language of the recent Agreement can only be assessed against the economic relations between Canada and the ASEAN nations, as well as the international legal framework in the context of which those relations evolve. While Canadian trade policy appears to favour an increased level of trade and investment with the countries of ASEAN this has yet to be realized. Canada's exports to ASEAN countries have declined in terms of its competitors (such as Australia and the United States) in that market. The need of the countries in the region for capital, technology and goods seems to present Canada with considerable potential for expansion. Conversely, ASEAN economic development will continue to be hampered if developed countries, like Canada, close off their markets

[8] *Supra*, note 1, Articles IX and X.

[9] *Id.*, Article XVII.2.

[10] *Id.*, Article XVI.

[11] *Id.*, Articles XVIII-XX.

to competitively priced products from ASEAN countries.[12] In terms of foreign investment Canada has also not played a major role in Southeast Asia but, given local growth rates, there is obvious scope for expansion.

Canada, along with all of the ASEAN nations, except Brunei, is a member of the General Agreement on Tariffs and Trade (GATT).[13] With respect to trade in goods, the GATT obligations of the parties to the Agreement far outweigh those under the Agreement itself. The most-favoured-nation article (Article V) is somewhat ambiguous but appears merely to restate its obligation in terms of treatment already provided for under GATT or any bilateral agreement in force between Canada and a non-GATT member of ASEAN.[14] In other words, the Agreement does not appear to state a separate most-favoured-nation standard outside those already provided for in other treaties. The fact that the Agreement focuses on investment, rather than trade, is not surprising given the recent major multilateral developments regarding trade law and policy.[15]

International regulation of investment is, unlike trade, relatively undeveloped. There are no generally recognized restrictions at customary international law on the ability of a state to restrict the entry of foreign investment. This is often referred to as the absence of a "right of establishment".[16] In the face of this void many states, including the parties to the Agreement, have laws which confer a generous degree of administrative discretion as to the entry of foreign business.

In the remainder of this discussion, various forms of international agreement relating to foreign investment will be outlined. After an unsuccessful attempt at multilateral accord in the period immediately after the Second World War, the modern trend of international practice has been to deal with investment on a bilateral level and several specialized forms of agreement have emerged.

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13 See F. Stone, CANADA, THE GATT AND THE INTERNATIONAL TRADE SYSTEM (1984), at 77. The author notes that ASEAN is not an attempt to establish a free-trade area or customs union under the GATT.

14 Prior to Thailand and the Philippines acceding to the GATT, they signed trade agreements with Canada in 1969 and 1972 respectively; see [1969] C.T.S. 11 and [1972] C.T.S. 28.

15 See Hon. D. S. Macdonald, *The Multilateral Trade Negotiations — A Lawyer's Perspective* (1979-80) 4 CAN. BUS. L.J. 139.

16 See L. Oppenheim, INTERNATIONAL LAW (1955), at 689-90 and Z. Kronfol, PROTECTION OF FOREIGN INVESTMENT (1972).

12 See D. Lecraw and K. Hay, *Canada's Economic Relations with the Countries of ASEAN*, to be published in *Canada and International Trade* (Curtis and Haglund eds. 1985), vol. 2.

V. INTERNATIONAL LEGAL PRACTICE AND FOREIGN INVESTMENT

A. The Havana Charter

The Charter of the proposed International Trade Organization (ITO) which was considered at the Havana Conference of 1947-48 recognized that states had the right to determine whether and on what terms foreign investment should be allowed.[17] The Charter was never operative but under Article XXIX of the GATT, the right of establishment contained in the ITO Charter must be recognized by the Contracting Parties to the full extent of their executive authority.[18] These provisions were recently considered by a GATT Panel in a case involving allegations by the United States that certain undertakings required of foreign investors into Canada were in violation of the GATT.[19] The Panel noted that not only had the provisions of the ITO Charter never entered into force but that Article XXIX had almost been deleted from the GATT in 1955. In the view of the Panel, the ITO Charter provisions could be seen as compatible with increased international co-operation to facilitate the reduction of barriers to foreign investment.

B. FCN Treaties

The most common international agreement concerning foreign investment is probably the form of treaty known as the treaty of Friendship, Commerce and Navigation (FCN Treaty). Canada is party to several FCN treaties, either in its own right or as a consequence of agreements negotiated by Great Britain in the period before Canada assumed full responsibility for its foreign relations. These instruments are akin to the ASEAN agreement insofar as they are designed to be long-term and embody basic principles of an economic relationship. Characteristically, FCN treaties deal with the mutual protection of persons and property and establish certain standards.[20] Unlike more recent economic accords, FCN treaties

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[17] Final Act and Related Documents, United Nations Conference on Trade and Employment, Havana, Cuba, 21 November 1947 to 24 March 1948, U.N. Doc. ICITO/114 (1948), Article 12.

[18] GATT, Basic Instruments and Selected Documents, vol. 4.

[19] Canada Administration of the Foreign Investment Review Act, GATT Panel Report, L/5504, 25 July 1983 and see R. Paterson, *The GATT and Restrictions on Foreign Investment: The United States Challenge to Canada's Foreign Investment Law* (1982) 1 U.C.L.A. Pacific Basin L.J. 224.

[20] See H. Walker, *Modern Treaties of Friendship, Commerce and Navigation* (1958) 42 Minn. L. Rev. 805.

focus on political, as well as economic, aspects of bilateral relationships. Like these more contemporary agreements, however, they are multipurpose and designed to establish a broad base for an ongoing relationship that may take varying forms.

Two provisions are typical of FCN treaties and consistent with their level of generality — the 'most-favoured-nation' clause and the 'national treatment' clause. Both are standards of non-discrimination. The former guarantees treatment equal to that extended to other foreigners. The latter measures discrimination domestically and promises treatment of foreigners equal to that afforded citizens. A good deal of legal uncertainty attends such provisions. In the first place, it is often not clear whether either obligation is conditional or unconditional — that is, does it depend on whether the other party granted it freely.[21] Secondly, since such treaty obligations only bind Canada internationally and are not part of her domestic law, they may not square with many discriminatory rules forming part of that law.[22]

The FCN treaty is now regarded as a dated tool for the regulation and protection of international investment. The provisions of FCN treaties are often inappropriate for new forms of investment and the contemporary needs of investors. In the case of the ASEAN countries their needs will vary with the state of development of the country concerned. In some less developed countries the focus may be on domestic processing of local products and the development of import-substituting manufacturing industries. In other more developed countries, the emphasis may be on the establishment of distribution facilities and licencing agrements. Since the FCN treaties were drafted, new concerns have arisen, such as expropriation, discriminatory treatment and dispute settlement which in turn, require new solutions.

The standard of national treatment forms part of the GATT insofar as imported goods are concerned.[23] In regard to foreign investment there is no similar statement in a multilateral convention, though a standard of equality between foreigners and nationals is

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[21] See E. Youngquist, *United States Commercial Treaties: Their Role in Foreign Economic Policy* (1967) 2 STUDIES IN LAW AND ECONOMIC DEVELOPMENT 72, at 80.

[22] See R. MacDonald, *The Relationship Between International Law and Domestic Law in Canada in* CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION (R. MacDonald, G. Morris and D. Johnston eds. 1974) 88, at 117-23.

often contained in bilateral accords. Article IV.2 of the Agreement provides as follows:

> Subject to their respective laws, regulations and other related directives governing foreign investment and to international agreements and arrangements, the Contracting Parties undertake to maintain a mutually beneficial investment climate and recognize the importance of according fair and equitable treatment to individuals and enterprises of the member countries of ASEAN and Canada, including treatment with respect to investments, taxation, repatriation of profits and capital.[24]

This hardly amounts to a guarantee of national treatment. Existing laws and official policies are exempted and the standard of treatment is 'fair and equitable' rather than equal. There is no separate guarantee of a right of establishment but merely a promise to maintain a mutually beneficial investment environment.

C. The OECD Draft Convention

There have been other attempts to devise multilateral conventions relating to the protection of foreign investment since the Havana Charter, though none have proceeded beyond the draft stage. In 1962 the Organization for Economic Co-operation and Development (OECD) adopted a Draft Convention on the Protection of Foreign Property.[25] Article 3 of the OECD Draft states that expropriatory measures may be taken in the public interest and under due process of law. The Draft then provides for compensation which represents the genuine value of the expropriated property. Canada is a member of the OECD but none of the ASEAN countries are. The above standard may be seen as biased in favour of the industrialized capital-exporting countries which make up most of the OECD membership. The OECD Draft is innovative in that it expressly deals with "creeping expropriation" — the process by which an investment is rendered uneconomic by discriminatory measures of the host government that fall short of actual seizure.[26] Multilateral attempts to deal with the protection of foreign investment have not been, on the whole, successful — largely because the organizations involved (like the OECD) have been seen as representing the in-

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[24] *Supra*, note 18, Article III.

[25] *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention* (1963) 11 INT'L LEGAL MATS. 241.

[26] See *id.*, Notes and Comments to Article 3.

terests of investor nations. The lack of progress, at a multilateral level, in developing rules concerning foreign investment, has given added significance to bilateral accords and other measures.

D. Foreign Investment Insurance

In Canada the Federal Export Development Corporation (EDC) has, since 1969, provided insurance against various categories of political risk in respect of investments in foreign countries.[27] This insurance (against expropriation, war, revolution and insurrection and incovertibility of revenues in local currencies) is provided by government and private insurance agencies in most developed countries.[28] While this coverage is sometimes seen as a doubtful incentive towards foreign direct investment, it does appear to offer a more realistic alternative than diplomatic intervention.

Any person carrying on business or other activities in Canada and who plans to invest abroad is eligible for cover.[29] EDC regards eligibility as extending to the significant development or expansion of an existing foreign enterprise.[30] There is no nationality requirement under the Canadian scheme which means that the investor need not be a Canadian citizen or a corporation incorporated in Canada.[31]

One difficulty with the present scheme is that it involves a high level of administrative discretion on the part of EDC. As a matter of practice EDC declines cover in certain instances though it is not restricted from doing so by its statute.[32] For example, it is a general requirement that in order to be eligible for insurance an investment must provide both economic benefits to Canada and the host country.[33] This has given rise to the argument, however fallacious, that in requiring dual benefit EDC is supporting enterprises that will compete with Canadian firms. In any event, EDC does not make public its reasons for declining cover.

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[27] Export Development Act, R.S.C. 1970, c. E-18, as amended.

[28] For a summary of national schemes, see OECD, Investing in Developing Countries (5th ed., 1983).

[29] Export Development Act, *supra,* note 27, s. 23(1).

[30] See *Foreign Investment Insurance,* EDC Information Circular, No. 80-2 (Revised September 1983).

[31] See T. Meron, Investment Insurance in International Law (1976), at 121-23.

[32] *Supra,* note 27, s. 34.

[33] *Supra,* note 29.

What exact risks are covered under the wording of EDC policies is still unclear. Coverage is for risks of a political, rather than a commercial, nature. This distinction is not always obvious, however, as when an investor is forced into bankruptcy as a result of the host government's mismanagement of its own economy.

The EDC policy provides for arbitration of claim disputes in accordance with the Arbitration Act of Ontario.[34] So far there have been no arbitrated claims concerning EDC foreign investment insurance. In interpreting EDC policies a Canadian arbitrator is likely to refer to American awards concerning similar policies issued in the United States by the Overseas Private Investment Corporation.[35] Although the EDC insurance contract is subject to interpretation according to the law of Ontario it would be unrealistic, given the subject matter of the contract, to ignore the claims experience of other national foreign investment insurance schemes.[36] What is ironic about such claims disputes is that they put the source country insurer in the position of having to defend the maligned actions of the host country. Though foreign investment insurance is designed to 'de-politicize' investment disputes, the findings of Canadian insurance arbitrators may be regarded by the host country as an extraterritorial application of foreign law.[37] To help overcome this problem Canadian arbitrators should apply the provisions of international law regarding investment disputes to resolve problems of interpretation.[38]

tion afforded the investor by the laws of the host country. Initially, it was mandatory before EDC could provide insurance that Canada

E. BILATERAL INVESTMENT INSURANCE AGREEMENTS

Since the introduction of EDC investment insurance there have been several changes in EDC requirements as to the level of protec-

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[34] *Export Development Corporation: Foreign Investment Insurance Contract*, Meron, *supra*, note 31, 809, at 830, especially clause 25.

[35] See P. Gilbert, *Expropriations and the Overseas Private Investment Corporations* (1977) 9 LAW & POLICY IN INT'L BUS. 515.

[36] V. Koven, *Expropriation and the 'Jurisprudence' of OPIC* (1981) 22 HARV. INT'L L.J. 269.

[37] This situation arose in connection with a claim OPIC allowed in respect of an inconvertibility claim by The Foster Wheeler Corporation: see W. Adams, *The Emerging Law of Dispute Settlement Under the United States Investment Insurance Program* (1971) 3 LAW & POLICY IN INT'L BUS. 101, at 118.

[38] See M. Neville, Jr., *The Present Status of Compensation by Foreign States for the Taking of Alien-Owned Property* (1980) 13 VANDERBILT J. OF TRANS. LAW 51.

had concluded a bilateral investment guarantee agreement with the host country.[39] These bilateral agreements provide for recognition by the host state of Canada's rights as subrogee under EDC insurance policies on which claims have been met. In addition, they set out EDC's rights to take local currency in satisfaction of the claim of the insured and establish a means to arbitrate disputes between Canada and the host state "in accordance with applicable principles and rules of public international law".[40]

In 1971, following the U.S. practice, Canada dispensed with the requirement that such agreements be a requisite in the issuance of insurance.[41] This occurred because many countries refused to sign agreements on the ground that in doing so they inferred that they were bad investment risks. It is now EDC policy to require that the host country grant its approval of a particular investment.[42] Approval must take the form of an official document containing a statement issued by the host government and identifying the investment concerned. If a bilateral agreement is in place, the host government's approval must state that the particular investment comes within the terms of the agreement.

The bilateral investment treaty of the kind entered into by Canada is an inadequate vehicle to deal with the numerous investment issues that are likely to arise between any two states. Most strikingly, this type of treaty assumes that Canada will always be the capital-exporting source state and its partner, the capital-importing host state. The most recent Canadian agreement, concerning foreign investment insurance with China, contains a reciprocity clause which recognizes the possibility of Chinese investment in Canada that might require Canadian guarantees matching those of China under the agreement.[43]

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[39] See *Exchange of Notes Between the Government of Canada and the Government of Malaysia Constituting An Agreement Relating to Canadian Investments in Malaysia Insured by the Government of Canada Through Its Agent, the Export Development Corporation* [1971] C.T.S. 37. Agreements are also in force between Canada and Singapore ([1971] C.T.S. 28), Indonesia ([1973] C.T.S. 32) and Thailand ([1983] C.T.S. 4). An agreement is presently being negotiated with the Philippines.

[40] *Id.*, clause 6.

[41] Export Development Amendment Act, 1971, 19-20 Eliz. II, c. 23, s. 9.

[42] See *supra*, note 30.

[43] *Exchange of Notes between the Government of Canada and the Government of the People's Republic of China Relating to Foreign Investment Insurance, Ottawa*, 18 January 1984, clause 7.

F. Bilateral Investment Promotion and Protection Treaties (BITs)

As a means to resolve investment disputes, the Canadian style of foreign investment insurance agreement is widely perceived as inadequate. The most useful models for a revision of the agreement are provided by investment promotion and protection treaties to which several Western European countries, Japan and the United States, are now parties.[44] BITs eschew the generality of the ASEAN Agreement and seek to achieve comprehensive protection for foreign investment by means of specific undertakings granted on a reciprocal basis.

In recognition of the risks of "creeping expropriation" BITs are not confined to guarantees against outright expropriatory actions but also seek protection against any measures that significantly impair investment rights. In the BIT between West Germany and Singapore, for example, expropriation must be "for the public benefit and against just and equitable compensation which represents the fair market value of the investment expropriated".[45] The controversial issue of compensation for expropriation seems to be less divisive in the context of bilateral agreements, such as BITs, than it is when debated in a multilateral context. Most BITs provide for the free transfer of capital and confer reciprocal most-favoured-nation and national treatment by the host state in respect of investment activities by nationals or corporations of the source country.

The BIT is increasingly seen as the appropriate international means for developed countries to promote and protect investment by their citizens in developing countries, as well as recognizing their reciprocal obligation to accord matching guarantees in return. The European treaties, unlike the United States model, do not go so far as to extend a right of establishment.[46] Given the existence of Canadian laws restricting direct foreign investment in this country, it is likely that Canada would follow European treaty practice on this question. Canada is also, given its fondness for 'Canadian content'

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[44] See M. Bergman, *Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty* (1983) 16 N.Y.U. J. of Int'l Law and Politics 1.

[45] See *Treaty Concerning the Promotion and Reciprocal Protection of Investments Between the Federal Republic of Germany and Singapore*, (1975) 1 Bundesgesetzblatt 49, Article 4(1).

[46] *Supra*, note 44, at 19-20. See Models for Bilateral Agreements on Promotion and Protection of Investments, (1984) 23 Int'l Legal Mats. 237.

requirements in connection with the administration of government economic assistance, unlikely to favour the United States' prohibition on performance requirements (local purchasing) in connection with investment approvals. It is interesting that in its first two BITs (with Panama and Egypt) the United States was unsuccessful in obtaining an unconditional right of entry included in either agreement.[47]

G. Resolution of Investment Disputes

While the trend towards provision of greater legal safeguards for investors pursuant to bilateral treaties is encouraging, it nevertheless has limits in relation to the legal security it can afford individual investors. Treaty obligations may not be accessible or enforceable by individual or corporate citizens of the states concerned. A long-standing alternative is for a private investor to seek some form of contractual guarantee from the host state.[48] Sometimes assurances will take the form of domestic laws or policies of the host state which attempt to encourage and proffer protection to foreign investors.[49] In connection with investments in public utilities and resource exploration, concession agreements are often entered into between states and foreign investors.

Such preliminary arrangements offer no assurance of protection in the event of a change of government or, more often in the case of developing countries, a major economic crisis in the host state. Many investors may lack confidence about resorting to courts in foreign countries to solve legal problems relating to their investments. In routine business matters there may be no other option, but where the matter involves activities by the host state government, the concern about submission to local jurisdiction may be fully justified. If, as is common, an investment takes the form of a partnership or joint venture agreement there will be an opportunity to select offshore arbitration as the means to settle disputes between the parties to the agreement. Multinational parties to a business venture may select ad hoc or institutional means to arbitrate their disputes. In the case of the ASEAN countries, resort may be had to the Rules for International Commercial Arbitration of the Economic Commission for Asia and the Far East (ECAFE) which were developed

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[47] See J. Pattison, *The United States-Egypt Bilateral Investment Treaty: A Prototype for Future Negotiation* (1983) 16 Cornell Int'l L.J. 305, at 333-34.

[48] See A. Fatouros, Government Guarantees to Foreign Investors (1962).

[49] Kronfol, *supra*, note 16, at 40-45.

in 1966 specifically for use in connection with international trade in the region.[50]

It is beyond the scope of the present discussion to discuss the efficacy of arbitration as a means to resolve foreign investment disputes but reference should be made to the substantial legal difficulties faced by Canadians in connection with international commercial arbitration.[51] These arise from the circumstance that arbitration law is within provincial legislative competence under the Constitution Act. This means that, as the law is presently understood, the Federal Parliament is unable to implement the provisions of any international agreement concerned with commercial arbitration which the Government of Canada might become party to.[52] Thus, Canada has signed none of the primary international conventions on the subject. The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides a mechanism for the recognition of awards given in the territory of members.[53] The test of enforceability is the place where the award was made and not the citizenship of the parties.[54] In the absence of a treaty, foreign awards may only be enforced in Canada under common law principles of recognition and enforcement of foreign arbitral awards.[55]

A major plank in the BIT has been inclusion of specific clauses dealing with dispute resolution. In many instances, where the dispute is between an investor and a host government, reference is made to submission to the International Centre for the Settlement

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[50] See *Resolutions of ECAFE Conference on Commercial Arbitration* (1966) 5 INT'L LEGAL MATS. 547. A regional arbitration centre has also been established in Kuala Lumpur under the auspices of the Asia-African Legal Consultative Committee. There are four Canadians on the international panel of arbitrators maintained by the centre; see *Note* (1979) J. OF WORLD TRADE LAW 88.

[51] For two valuable discussions of the merits and drawbacks of international commercial arbitration see J. Kerr., *International Arbitration v. Litigation* [1980] J. BUS. LAW 164 and H. DeVries, *International Commercial Arbitration: A Contractual Substitute for National Courts* (1982) 57 TULANE L. REV. 42.

[52] See J. Brierley, *International Trade Arbitration: The Canadian Viewpoint*, in CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION, *supra*, note 22, at 826.

[53] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards.* Done at New York, on 10 June 1958: See U.N. Doc. No. E/Conf.26/9 Rev. 1. Of the six ASEAN countries, only Thailand, Indonesia and the Philippines have signed the New York convention.

[54] *Id.*, Article III.

[55] See W. Graham, *Enforcement of Arbitration Awards*, Paper presented at Joint British Columbia-Washington Program of the Continuing Legal Education Society of B.C. (Vancouver, 1983).

of Investment Disputes Between States and Nationals of Other States (ICSID).[56]

ICSID was set up under a 1966 World Bank-sponsored Convention in accord with that organization's interest in encouraging the flow of capital to developing countries. ICSID is not an arbitral body in its own right, but it is designed to facilitate the establishment of arbitral tribunals to resolve investment disputes between contracting states and nationals of other contracting states. The jurisdiction of the Centre rests on the consent of the parties but no party may withdraw its consent unilaterally. ICSID constitutes a novel form of dispute resolution in addition to litigation, private arbitration and diplomatic protection. The consent to ICSID arbitration in some BITs has the effect of removing investment disputes from the territory of either disputant and increasing the likelihood of enforcement of any subsequent award.[57]

VI. CONCLUSION

The ASEAN Agreement is an omnibus arrangement dealing with political relations and development assistance, as well as trade and investment. The above discussion has focused on foreign direct investment since that is the topic most in need of further legal developments for its continued protection and encouragement. Insofar as investment is concerned, Canadians face two major legal disadvantages over their competitors in the region — they cannot guarantee recognition of the outcome of arbitrated investment disputes and they lack the specific sorts of protection afforded by the more sophisticated investment treaties now in wide-spread use. In this respect, Canada could usefully emulate West Germany — which, aware of its lack of historical relationships with developing countries, has

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[56] See *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (1965) 4 INT'L LEGAL MATS. 524. All the ASEAN nations except Thailand and Brunei are signatories of the ICSID Convention.

[57] See Kronfol, *supra*, note 16, at 144-50. The value of the ICSID system can be illustrated with reference to Canadian experience. In 1976 the government of Indonesia unilaterally decided to amend an oil production-sharing contract between a subsidiary of Hudson Bay Mining and Smelting Co., Limited and the state-owned oil agency (Pertamina). The change resulted in Hudson Bay being obliged to make a special payment to Pertamina as well as increasing the profit share of the agency. The action may not be within the cover provided for expropriatory action in the EDC investment insurance policy. It is not known whether Hudson Bay had such insurance cover or not. In either case, this is the type of problem well-suited to the ICSID dispute resolution process.

signed the largest number of modern investments treaties. Until it is provided with such legal support, the ASEAN Agreement will be little more than an article of faith.

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