



# **ASEAN Investment Report**

## **2004**

**ASEAN Secretariat**



The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967. The members of the Association are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam. The ASEAN Secretariat is based in Jakarta, Indonesia.

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# NOTE

This report has not been formally edited and the views expressed do not necessarily reflect the views or endorsement of the ASEAN member countries. This report has been produced to facilitate a better understanding of the investment situation in ASEAN.

Any interpretation of the FDI data in this report should be treated with care. As working is on-going in harmonizing and improving FDI data quality across the region, the present data set could over-estimate or under-estimate the true extent of foreign investment activities in a country and in the region.

# ABBREVIATION

AFTA	:	ASEAN Free Trade Area
AIA	:	ASEAN Investment Area
AICO	:	ASEAN Industrial Cooperation
AISP	:	ASEAN Integration System of Preferences
ASEAN	:	Association of South East Asian Nation
BOI	:	Board of Investment
BP	:	Business Process
CEPT	:	Common Effective Preferential Tariff
CIS	:	Commonwealth of Independent States
EU	:	European Union
EITO	:	European Information Technology Observatory
FDI	:	Foreign Direct Investment
FTA	:	Free Trade Agreement
GDP	:	Gross Domestic Product
IT	:	Information Technology
JETRO	:	Japan External Trade Organisation
M&As	:	Mergers and Acquisitions
NAPOCOR	:	National Power Corporation's
OECD	:	Organisation for Economic Co-operation and Development
PwC	:	Pricewaterhouse Coopers
PRC	:	People's Republic of China
SDRs	:	Special Drawing Rights
UNCTAD	:	United Nations Conference on Trade and Development
WTO	:	World Trade Organisation

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# INTRODUCTION

The ASEAN Investment Report 2004 provides a comprehensive historical record report of the region's performance in attracting Foreign Direct Investment (FDI) flows for the calendar year 2004.

The Report captures the significant rise in FDI in 2004. FDI into ASEAN increased in 2004 to \$ 25.6 billion from \$ 18.4 billion in 2003. This 39% year-on-year growth, which came despite challenges such as international terrorism and outbreak of communicable diseases, is part of the regional contribution to the global FDI recovery phenomenon which began to occur last year. The global FDI increased by 2.45% from \$ 632.6 billion in 2003 to \$ 648.1 billion in 2004, driven by notable increases from developing economies, which included Member Countries from ASEAN.

The top five investors into ASEAN in 2004 were the United States (20%), Japan (10%), intra-ASEAN (9.5%), the Netherlands (9%) and the United Kingdom (7%). Intra-ASEAN investments have grown considerably since 1995 and have cumulated to as much as \$ 30 billion from then until 2004. In 2004, intra-ASEAN FDI stood at \$2.4 billion, an increase of 5.7 % over 2003. The increase demonstrates that companies in ASEAN are continuing to leverage on the individual Member Countries' strengths, to take advantage of preferential tariffs accorded in ASEAN Free Trade Area (AFTA), and harness synergies by utilising regional production networks.

ASEAN is fast tracking its economic integration efforts to keep up with the pace of other regions and continents. ASEAN is now intensifying its efforts to integrate and move faster towards the formation of a single economic community. In October 2003, ASEAN Leaders endorsed the Bali Concord II which envisions the creation of an ASEAN Economic Community by the year 2020. This is to realise the ASEAN Vision 2020 to create a "stable, prosperous and highly competitive ASEAN Economic region in which there is a free flow of goods, services, investment and a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities in year 2020".

Aside from the regional initiatives that have so far been formulated and carried out by ASEAN to increase investments, each ASEAN member continues to reshape its investment climate in accordance with regionally and multilaterally accepted principles through new investment initiatives they enact unilaterally.

These individual measures are encouraged by various regional agreements such as AIA Agreement and AFTA to increase the competitiveness of the region in attracting FDI. These include the improvements of the overall investment policy framework, granting of incentives, opening up of sectors for foreign investments, reduction of business cost through lowered taxation, streamlining and simplification of the investment process and other investment facilitation measures.

Publication of the ASEAN Investment Reports on the state of FDI in ASEAN has been published by the ASEAN Secretariat since 1999 to provide a better understanding of the FDI situation in the region in our efforts towards greater transparency.

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# Chapter One

## General External Environment

### Global GDP Growth in 2003-2004

2004 figured in as a good year for the global economy in near absolute terms as Global Gross Domestic Product (GDP) growth climbed to 5.1% in 2004 on a year-on-year basis. Apart from continuing the positive linear streak in global GDP growth for the 3<sup>rd</sup> straight year, this performance also showcased the highest rate of global GDP growth since 1976. A modest forecast of 4.3% however was given for 2005. This can be better appreciated by reference to Table 1 below.

**Table 1: Summary of World Output**

**Table 1. Summary of World Output<sup>1</sup>**  
(Annual percent change)

	Ten-Year Averages											
	1987-96	1997-2006	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
<b>World</b>	3.3	3.9	4.2	2.8	3.7	4.6	2.5	3.0	4.0	5.1	4.3	4.4
<b>Advanced economies</b>	3.0	2.7	3.4	2.6	3.5	3.8	1.2	1.6	2.0	3.4	2.6	3.0
United States	2.9	3.4	4.5	4.2	4.4	3.7	0.8	1.9	3.0	4.4	3.6	3.6
Euro area	...	2.0	2.4	2.8	2.8	3.6	1.6	0.9	0.5	2.0	1.6	2.3
Japan	3.2	0.9	1.7	-1.1	—	2.4	0.2	-0.3	1.4	2.6	0.8	1.9
Other advanced economies <sup>2</sup>	3.8	3.3	4.1	1.8	4.7	5.2	1.8	3.2	2.3	3.8	3.1	3.4
<b>Other emerging market and developing countries</b>	3.9	5.3	5.3	3.0	4.0	5.8	4.2	4.7	6.4	7.2	6.3	6.0
<b>Regional groups</b>												
Africa	2.2	4.0	3.2	3.0	2.8	3.2	4.0	3.6	4.6	5.1	5.0	5.4
Central and eastern Europe	0.9	3.6	4.2	2.8	0.4	4.9	0.2	4.4	4.6	6.1	4.5	4.5
Commonwealth of Independent States <sup>3</sup>	...	5.2	1.1	-3.5	5.1	9.1	6.4	5.4	7.9	8.2	6.5	6.0
Developing Asia	7.8	6.6	6.5	4.1	6.2	6.5	5.8	6.5	8.1	8.2	7.4	7.1
Middle East	3.4	4.5	4.8	4.0	2.1	5.4	3.3	4.1	5.8	5.5	5.0	4.9
Western Hemisphere	2.8	2.8	5.2	2.3	0.4	3.9	0.5	-0.1	2.2	5.7	4.1	3.7
<i>Memorandum</i>												
European Union	2.2	2.4	2.8	3.0	2.9	3.7	1.8	1.2	1.2	2.5	2.1	2.5

Source: IMF World Economic Outlook 2005

The positive rate of growth shown by the global economy last year was mainly driven by the surge in the prices of oil and primary commodities, which hit record highs last year. Table 2 below illustrates the dramatic rate of increase recorded in fuel and non-fuel commodity prices which stimulated global production and bolstered international commodity trade.

**Table 2: Summary of World Trade Volumes and Prices**

(Annual percentage change based on US dollar)												
	Ten-Year Averages		1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
	1987- 1996	1997- 2006										
Manufacturers	4.2	0.6	-9.0	-3.8	-2.5	-5.7	-3.2	2.5	13.4	8.8	6.2	1.3
Oil	3.7	7.9	-5.4	-32.1	37.5	57.0	-13.8	2.5	15.8	30.7	23.2	-5.9
Non-fuel primary commodities	2.7	-0.2	-2.9	-14.5	-6.9	4.5	-4.1	0.8	7.1	18.8	3.8	-5.1

Source: IMF World Economic Outlook (2005)

Among the non-fuel primary commodities, it was principally the price of base metals which inflated the most, showing an increase of over 200%. Since most of these commodities (including oil) are mined in developing countries, a significant increase in their share of total world exports was noted in 2004. As a probable net effect, this boom in commodity prices may expand money supply, lower interest rates, and improve export earnings in developing countries (not to mention spur investment activities in the mining and oil exploration sector).

## Merchandise trade growth in 2003-2004

Climbing up the same pathway as global FDI and GDP output, real merchandise trade for 2004 grew by a record high of 9% for that same year, overtaking global GDP growth as shown in Table 3 below. Such is considered as the best global performance since 2000 and the third highest in the past decades.<sup>1</sup> Notably, according to the WTO Secretariat, the “most dynamic” traders last year were found in Asia, South and Central America, and the Commonwealth of Independent States (CIS) where the average rates of growth in trade volumes realized in the said regions were in double digits. This contrasts with the rate of trade volume growth registered by Europe and the US in the same year, which were well below the global average.<sup>2</sup> Nevertheless, for next year, it is projected that a more moderate growth in total trade volume will be seen settling at 6.5% as international consumer markets readjust to last year’s price surges.

<sup>1</sup> See World Trade Report 2005 by the WTO Secretariat

<sup>2</sup> ibid

**Table 3: World trade and output developments, 1990-2004****World trade and output developments, 1990-2004**

(At constant prices, annual percentage change)

	1990-2000	2000-2004	2001	2002	2003	2004
Merchandise exports	6.4	4.2	-0.5	3.5	5.0	9.0
Merchandise production	2.5	...	-0.7	0.8	2.8	...
GDP at market exchange rates	2.5	2.5	1.4	1.8	2.6	4.0
GDP at PPP	3.4	3.6	2.4	3.0	3.9	5.0

Source: WTO World Trade Report

Nominal merchandise trade growth in 2004 was recorded at 21% as illustrated in Table 4 below. This figure represents the rate of growth in 25 years and was brought forth principally by brisk real trade growth, a steep rise in dollar prices by 11%,<sup>3</sup> and climbing oil and primary commodity prices.

**Table 4: World merchandise trade by major region, 2004****World merchandise trade by major region, 2004**

(Billion dollars and percentage)

	Exports					Imports				
	Value	Annual percentage change				Value	Annual percentage change			
	2004	2001	2002	2003	2004	2004	2001	2002	2003	2004
World	8880	-4	5	17	21	9215	-4	4	16	21
North America	1330	-6	-4	5	14	1727	-6	2	7	16
United States	819	-6	-5	4	13	1526	-6	2	8	17
South and Central America <sup>a</sup>	272	-2	0	13	28	238	-1	-13	5	27
Europe	4024	1	7	19	19	4133	-2	5	20	20
European Union (25)	3708	1	7	19	19	3784	-1	5	20	19
CIS	263	0	5	27	35	171	16	9	27	31
Africa	228	-6	3	23	31	207	4	1	22	25
Middle East	379	-8	5	21	26	243	5	4	13	23
Asia	2385	-9	8	18	25	2214	-7	6	19	27
China	593	-16	22	35	35	561	-8	21	40	36
Japan	565	7	3	13	20	455	8	-3	14	19

<sup>a</sup> Includes the Caribbean.

Source: WTO World Trade Report 2005

Notably, the prices of fuels and metals grew by over 30%<sup>4</sup> whilst food and textile prices however remained relatively stable.

<sup>3</sup> See [http://www.wto.org/english/news\\_e/pres05\\_e/pr401\\_e.htm](http://www.wto.org/english/news_e/pres05_e/pr401_e.htm)<sup>4</sup> IMF commodity price index

**Table 5: Nonfuel Commodity Prices****Nonfuel Commodity Prices<sup>1</sup>**

(Annual percentage change; U.S. dollar terms)

	Ten-Year Averages		1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
	1987-96	1997-2006										
<b>Nonfuel primary commodities</b>	<b>2.7</b>	<b>-0.2</b>	<b>-2.9</b>	<b>-14.5</b>	<b>-6.9</b>	<b>4.5</b>	<b>-4.1</b>	<b>0.8</b>	<b>7.1</b>	<b>18.8</b>	<b>3.8</b>	<b>-5.1</b>
Food	2.3	-1.7	-8.9	-11.0	-11.4	1.8	2.1	1.3	5.9	14.5	-4.7	-3.4
Beverages	-4.0	-1.2	31.1	-13.2	-21.3	-15.1	-16.1	16.5	4.9	3.0	12.7	-2.3
Agricultural raw materials	5.9	-0.9	-4.7	-16.7	1.2	4.4	-4.9	1.8	3.7	6.0	0.9	1.4
Metals	3.2	2.5	1.2	-17.7	-1.1	12.2	-9.8	-2.7	11.9	36.4	14.7	-10.2

Source: IMF World Economic Outlook

## Global FDI Situation in 2003-2004

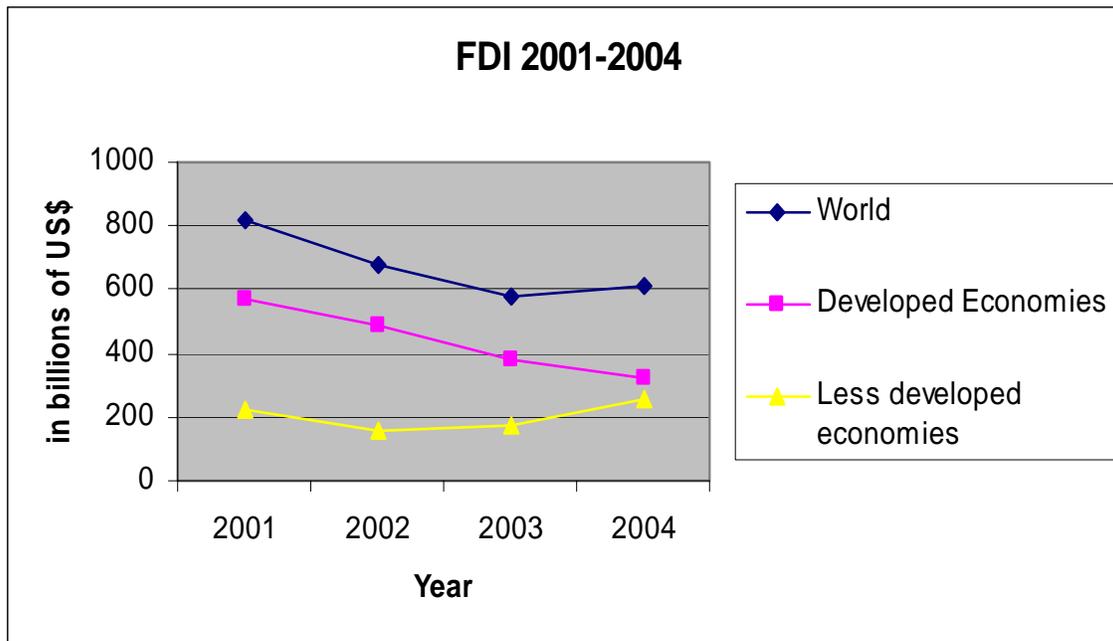
The investment climate for 2004 slightly improved compared to the previous years as, for the first time in 3 years, positive growth was once again recorded for global FDI. According to the Japan External Trade Organization (JETRO), global FDI increased by 3.4% to US\$ 639.8 billion and global cross-border mergers and acquisitions (M&A)<sup>5</sup> surged to US\$ 429.1 billion<sup>6</sup>. Apart from the linkages to hefty gains in corporate profits last year and an expansion in East Asian economies, this rebound in global FDI performance was driven in large part by an upsurge in the prices of oil last year which consequently also brought up primary commodity prices resulting in a moderately elevated rate of inflation. Moreover, since significant increases were noted in the real estate sector and in acquisitions made by investment funds, it may be reasonable to infer that investors were eager to transfer their money to invest in areas where higher rates of returns were anticipated. Nevertheless, it must be considered that although global FDI has reversed its declining trend, the present growth rates have yet to surpass their pre-crisis levels. For one, the present value of global FDI is less than half of the peak reached in 2000 and is still below the levels reached in 1998.<sup>7</sup> These may be noted in the Table 5 below, which is based on historical figures provided by UNCTAD below.

<sup>5</sup> Which, according to the World Investment Report for 2004 by UNCTAD, has been the key driver of global FDI since the 1980s.

<sup>6</sup> <http://www.jetro.go.jp/en/news/releases/20050811677-news>

<sup>7</sup> World Trade Report 2005 by the WTO Secretariat

**Table 6: Global FDI Performance 2001-2004**



Source: UNCTAD

## Global Outlook for GDP, Trade and FDI in 2005

### *GDP*

As shown in Table 1 earlier, the rate of global GDP growth for 2005 and 2006 is expected to slow down to 4.3% and 4.4% respectively. This follows an exceptionally strong 5.1% growth rate recorded in 2004 fueled by a rise in oil and primary commodity prices. The projected slowdown in GDP growth in the coming years is attributed to an expected reduction in world prices which would result from the continued circulation of the large quantities of goods produced the previous year at the height of the production surge.

### *Trade*

As mentioned above, a dampening effect may be anticipated in 2005 in which prices may moderately dip as a consequence of the surge in production last year brought about by the rise in primary commodity and oil prices. This would consequently correspond to reduced trade volumes and the lower global GDP growth rates that have been forecasted for this year and the next. Table 5 above

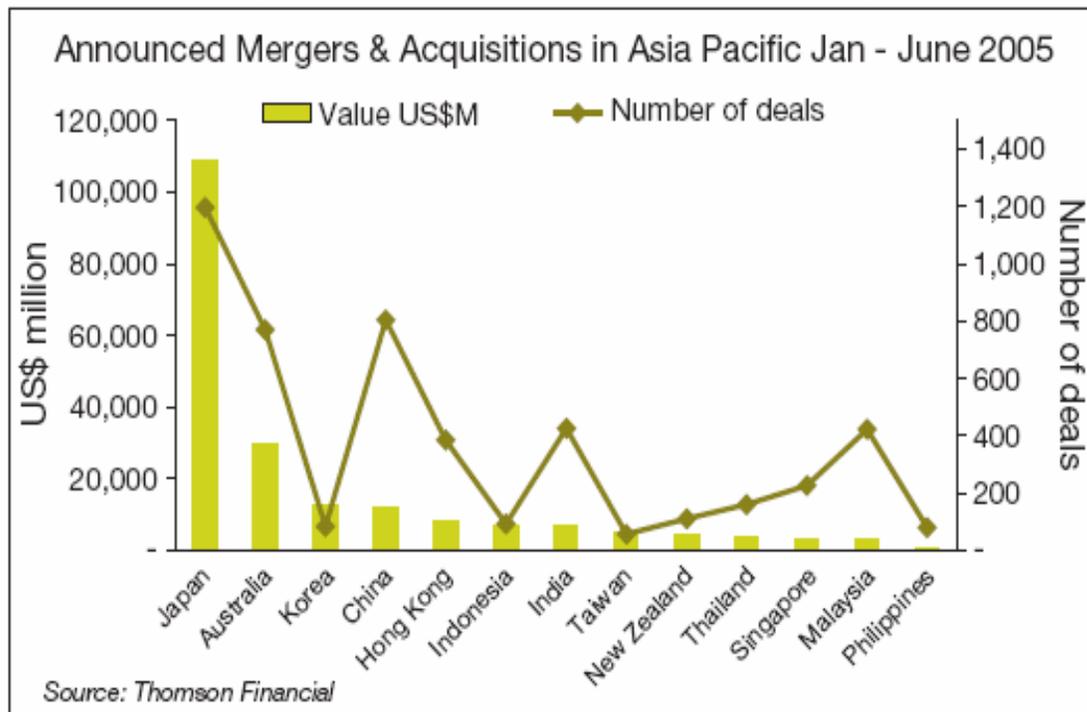
shows the forecasted rates in US dollars, SDRs, and Euros all indicative of an anticipated downtrend to cool off the heightened global economic activity last year.

### FDI

While global GDP growth and trade volumes may dip in the coming years, investments worldwide are foreseen to maintain their upward trend. Generally, an increase in capital investments is expected for developed and developing countries. These growth figures, however, are expected to be driven mainly by M&A in developed countries and greenfield investments<sup>8</sup> in developing countries.

With over 9,300 projects worldwide, cross border greenfield FDI far surpassed cross-border M&A in 2003 which only recorded some 4,500 deals.<sup>9</sup> It is expected however that the projected rise in FDI for 2005 will be a function more of M&As particularly in the area of services where most investments are expected to take place.

**Table 7: Announced Mergers and Acquisitions in Asia –Pacific Jan-Jun 2005**



Taken from the PricewaterhouseCoopers Asia-Pacific M&A Bulletin Mid-Year 2005

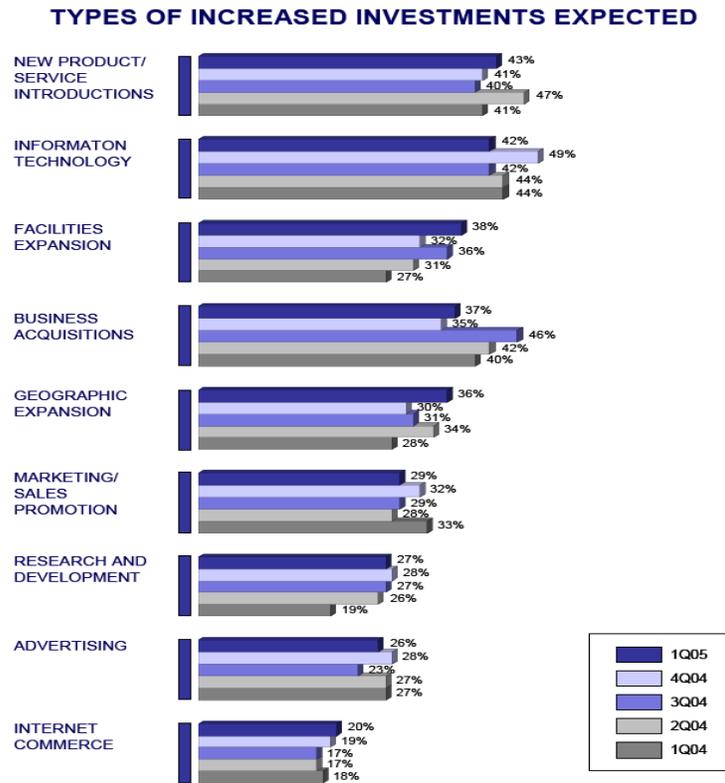
<sup>8</sup> Greenfield investments are defined in simple terms as the establishment of entirely new business operations in a host country. See <http://www.cipe.org/publications/fs/articles/article0055.htm>

<sup>9</sup> World Investment Report 2004 by the UNCTAD

a. *Information Technology*

FDI particularly in services such as telecommunication and information technology is expanding and at present have surpassed even the mining industry. However, it is noticeable in Diagram 1 below that whereas investments in information technology are expected to rise, the corresponding increase in anticipated investments in internet commerce does not seem to register a commensurate increase.

**Diagram 1: Types of Increased Investments Expected**



Source: PwC 8<sup>th</sup> Annual CEO Survey

b. *Outsourcing trends*

As services for each country become more tradable, outsourcing will likely increase. Services as simple as data entry or as complicated or of high-value as financial analysis need various skills. The expenses or costs involved is one of the considerations that result in outsourcing. Even FDI of India in IT services has begun to grow rapidly. 15 of Indian major softwares and related companies have

invested in developed nations while call-centres and business process outsourcing have set-up affiliates mostly in the Philippines and Mexico.<sup>10</sup>

Below are current trends in global outsourcing culled from the WTO Report:

- The OECD (2005) reports the size of the global market for outsourced IT and business process (BP) services to be close to \$260 billion in 2001. The value of offshored IT and business service activities are put at \$32 billion, representing 12.3% of the global IT market. Domestic outsourcing is given at \$227 billion. Two-thirds of all offshoring is estimated to be captive offshoring, in other words referring to intra-firm trade. This estimate of the total IT and business process services market does not include IT services provided from affiliated firms in the home market (or “internal domestic supply” in the OECD terminology);<sup>11</sup>
- McKinsey (2003) reports that US companies offshored IT and business process (BP) services worth \$26 billion to 12 major markets in 2001. The share of US companies in global offshoring activities is estimated at 70% and this implies a global value for all offshored IT and BP services in the order of at least \$35 billion in 2001. The 12 markets exclude major EU markets and therefore the above estimate somewhat underestimates the global offshoring of US companies worldwide<sup>12</sup>;
- The European Information Technology Observatory (EITO) (2004) reports a global market for IT services and software of €591 billion in 2003 (measured in 2002 exchange rates). Converted into current 2003 U.S. dollars, this estimate is equivalent to an amount of about \$710 billion in 2003. This estimate excludes BP services. Adjusted for exchange rate and market growth between 2001 and 2002, the EITO estimate exceeds that of OECD’s study (2005) by a large margin, despite its narrower sectoral coverage. EITO (2004) also indicates that the growth of IT markets had been significantly faster than GDP growth in the 1995-2000 period but became less dynamic than GDP growth in the 2000-2004 period<sup>13</sup>;
- Gartner (2004) reports that global software and IT expenditure amounted to \$663 billion in 2003. BP services are again excluded. Software expenditure alone reached \$93.8 billion and that of IT services \$568.9 billion. Gartner (2004) claims that “outsourcing will account for 53 per cent of the total worldwide IT services market in 2004”. This would be equivalent to \$322 billion in 2004 and about \$285 billion in 2003. No data

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<sup>10</sup> See World Investment Report 2004 by UNCTAD page 27, Chapter I

<sup>11</sup> See WTO World Trade Report 2005 page 275

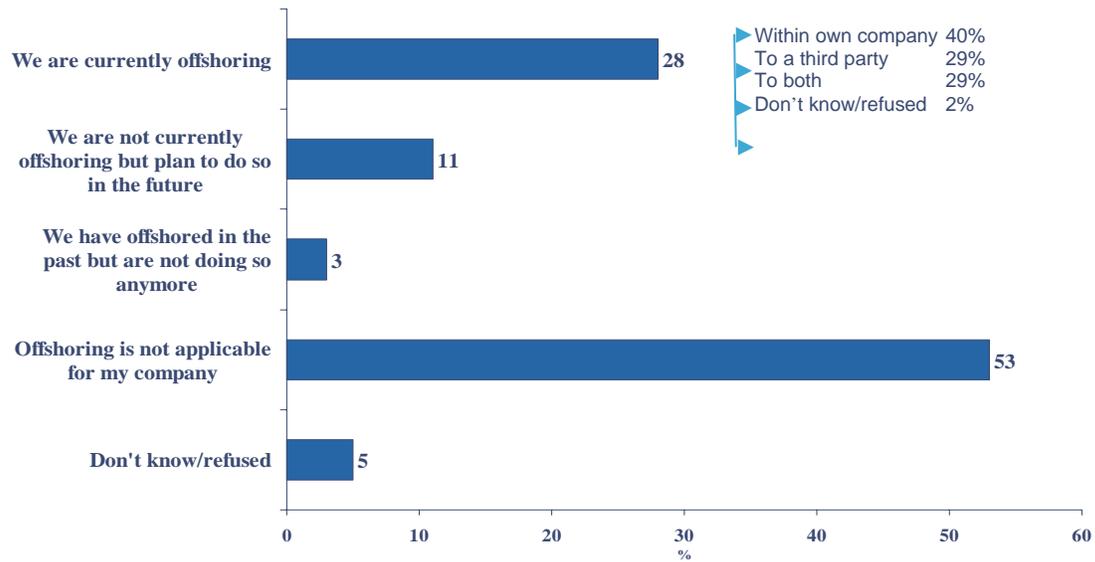
<sup>12</sup> *ibid*

<sup>13</sup> *ibid*

are given for the share of offshored IT services in the total of outsourced activities and software expenditure is not taken into account.<sup>14</sup>

The PwC 8<sup>th</sup> CEO Survey nearly reveals similar trends, showing a high percentage of companies that are currently or are planning to outsource particular segments of their operations, as seen in Diagram 2 below.

**Diagram 2: Plans to outsource/offshore**



Source: PwC 8<sup>th</sup> Annual Global CEO Survey

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<sup>14</sup> ibid

# Chapter Two

## ASEAN Investment Performance

### ASEAN FDI Recovers but below Peak Levels

As indicated in Table 8 below, investments in ASEAN increased in 2004 to USD\$ 25.6 billion from \$18.4 billion in 2003. This 39% growth is a regional indication of the earlier discussed global FDI recovery phenomenon which began to occur last year.

**Table 8: Total FDI per country 2001-2004 in millions US\$**

HOST COUNTRY	2001	2002	2003	2004	TOTAL CUMULATIVE 2001-2004
Brunei Darussalam	526	1,035	3,123	161	4,846
Cambodia	149	145	84	131	510
Indonesia	-3,279	145	-596	1,023	-2,706
Lao PDR	24	25	19	17	86
Malaysia	554	3,203	2,473	4,624	10,854
Myanmar	192	191	291	145	820
Philippines	982	1,111	319	469	2,881
Singapore	14,122	5,821	9,331	16,059	45,333
Thailand	3,886	947	1,952	1,414	8,199
Viet Nam	1,300	1,200	1,450	1,610	5,561
<b>ASEAN TOTAL</b>	<b>18,457</b>	<b>13,825</b>	<b>18,447</b>	<b>25,654</b>	<b>76,383</b>

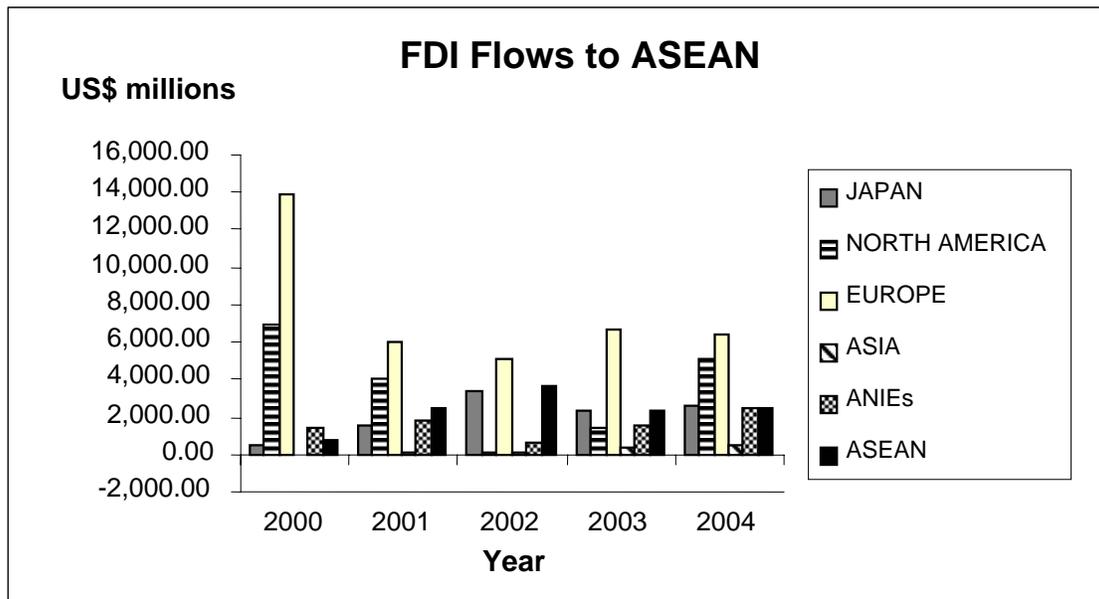
Source: ASEAN Secretariat - ASEAN FDI Database

This recovery, as with global FDI, still falls below the peak levels it experienced in the second quarter of 1997. Furthermore, ASEAN would still have to struggle and compete with other countries such as China and India which are vying for larger shares of global FDI, and have a good deal of resource advantage. Nonetheless, the increase of FDI into ASEAN from mid-2002 to 2004 has outpaced the increase in global FDI in 2004 thereby suggesting that the region continues to be a preferred investment destination despite challenges such as international terrorism and the outbreak of SARS and bird flu.

## FDI Sources

The primary sources of inward FDI into ASEAN have been Japan, Europe, North America and other ASEAN countries as can be viewed in Table 9 below. A good number of these investments were realized through M&A's which is expected to be the continued mode of inward investments in the region for the coming years.

**Table 9: FDI to ASEAN from selected regions/countries from 2000 to 2004 (US\$ million)**



Source: ASEAN Secretariat

Noticeably, Intra-ASEAN investments have grown considerably since 1995 and have cumulated to as much as US\$ 30 billion from then until 2004 as shown in Table 10 below. This bodes well for an increase in business activity and investment attractiveness within ASEAN and is indicative of a burgeoning business climate.

**Table 10 Intra-ASEAN FDI Flows**

**INTRA-ASEAN FDI FLOWS  
CUMULATIVE 1995-2004**

(US\$ million)

HOST Source	BRU	CAM	IND	LAO	MAL		MYR	PHI	SIN	TH	VN	Total Cumulative 1995-2004
ASEAN	1,405	98	1,888	269	1,963	7,989	1,047	1,355	7,145	6,176	2,939	30,309
Brunei D	-	-	(27)	-	178	299	-	0	164	2	-	438
Cambodia	-	-	0.00	0.04	1.42	2.64	-	-	5.31	11.76	0.60	20.34
Indonesia	55	1	1	0	138	313	35	39	3329	43	60	3876
Lao PDR	0	0	0	0	0	0	0	0	1	5	6	12
Malaysia	224	9	439	97	0	0	57	86	3268	198	538	4916
Myanmar	0	0	0	0	-1	0	0	0	49	2	0	51
Philippines	4	2	13	0	57	93	4	0	33	212	49	409
Singapore	1113	22	1322	10	1479	7048	755	1202	0	5698	1830	19000
Thailand	8	37	140	156	103	196	196	29	279	0	456	1495
Viet Nam	0	27	0	5	7	38	0	0	17	5	0	93

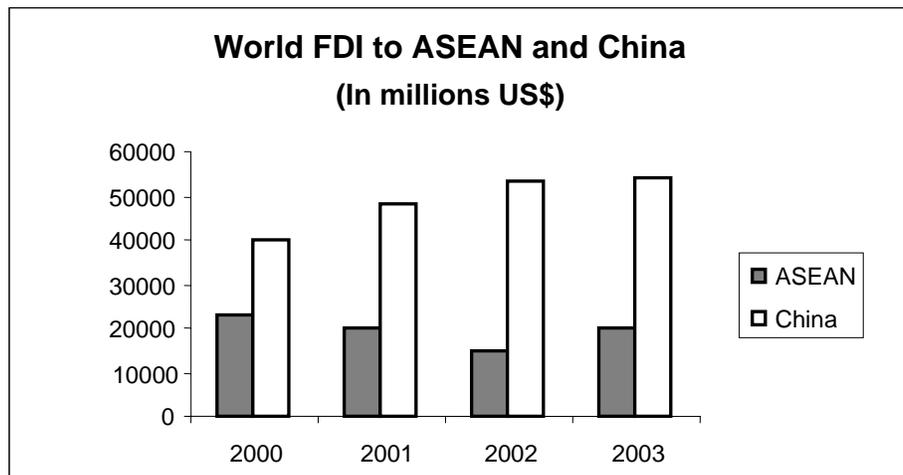
Source: ASEAN Secretariat

## China and India continue to attract FDI

While there have been considerable changes in the movement of the global flow of investments into ASEAN, China remains the largest recipient inward FDI (as shown in Table 11 below), ASEAN countries should continue to diversify their assets in the 11 priority sectors to become attractive for FDI.

The allocation of foreign investments has significantly been changing since China entered and opened its doors to globalise its economy. It seems that the inflow of FDI into China has heavily increased as compared to that of ASEAN countries. Even Japanese businesses which were once hesitant before in investing in China, have been expanding and even relocating there. There is a possibility for this trend to decline however with the foray of various non-economic factors which have recently interfered in Sino-Japan relations.

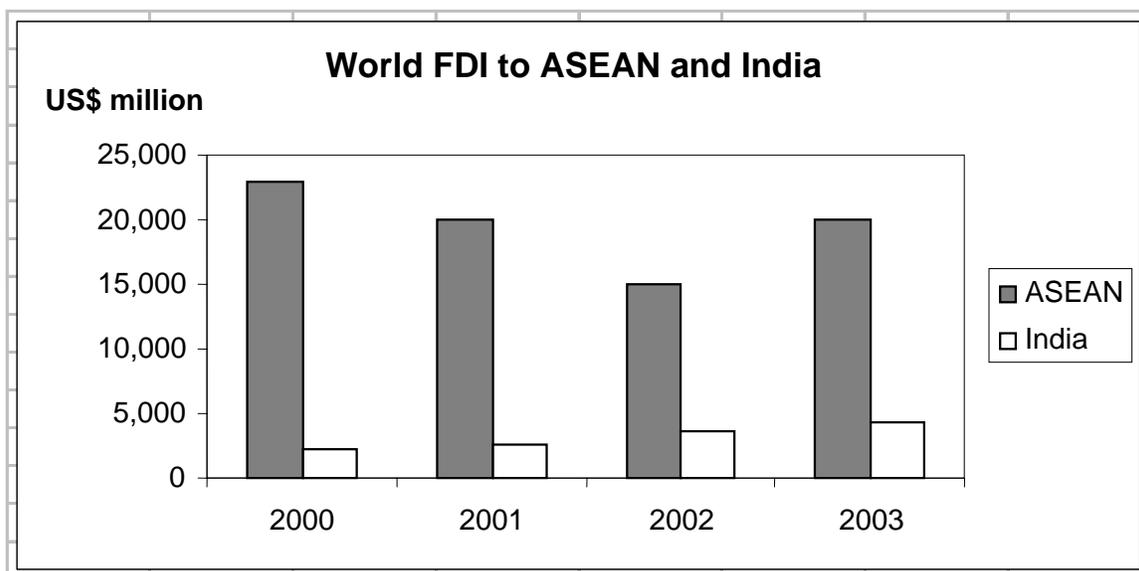
**Table 11: World FDI to ASEAN and China**



Source: ASEAN Secretariat

Investments into India have likewise grown tremendously, showing constant positive performance in from 2000 to 2003, relative to ASEAN. India, in the wake of its policy of accelerated liberalisation, is being targeted by foreign investors keen on tapping its highly skilled labor pool and its cost-efficient production base. Table 12 below shows India improving FDI performance over the recent years which is gaining on ASEAN. Trends of FDI continuously moving up to China and India - emphasises the necessity to improve ASEAN competitiveness.

**Table 12: World FDI to ASEAN and India**

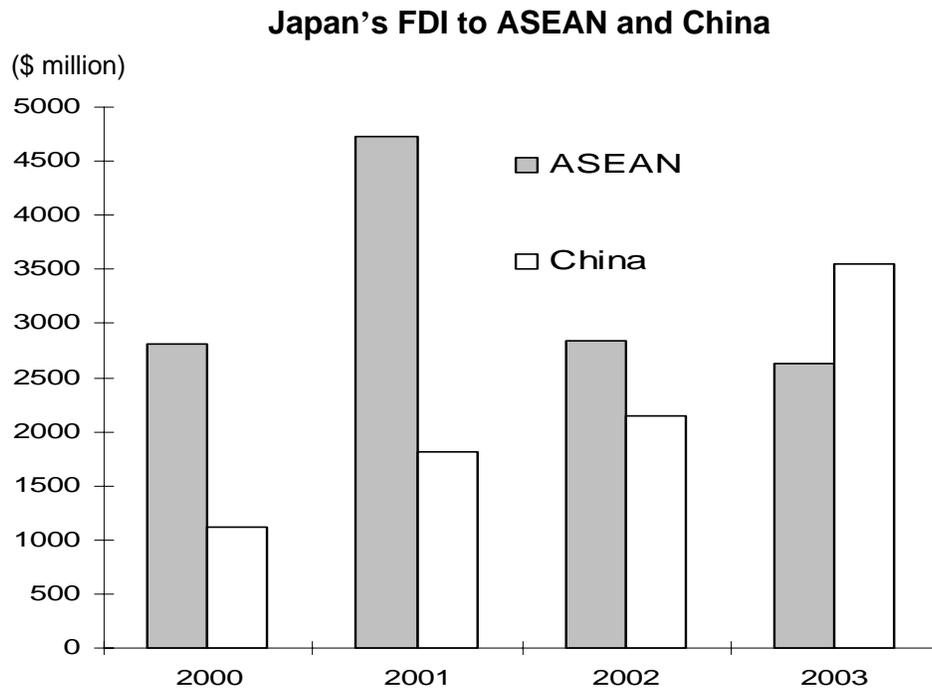


Source: ASEAN Secretariat

### *Japan FDI into China increasing*

Japan on the other hand, has not been remiss in exploiting the advantages offered by investing in China. Table 13 below shows a clear increase in Japanese FDI moving into China, eventually outflanking the value of its investments in ASEAN in 2003.

**Table 13: Japan FDI to ASEAN and China**



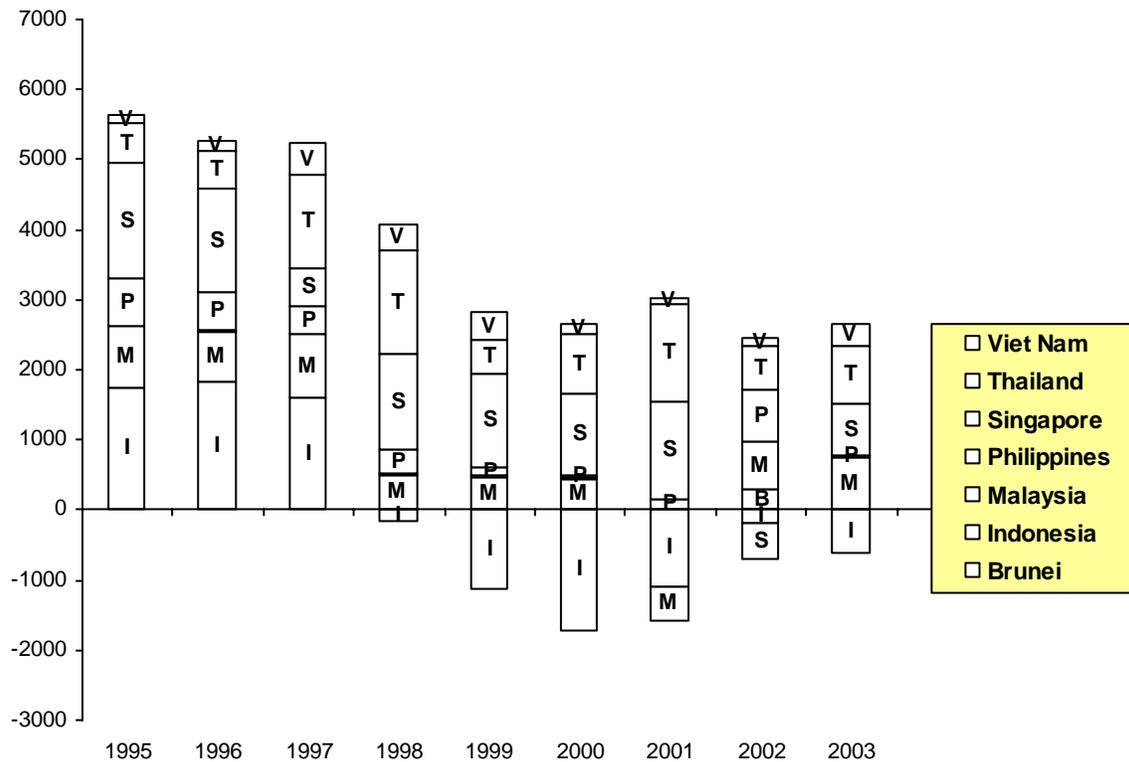
Source: United Nations, "World Investment Report 2004"

Japan's investments into ASEAN countries on the other hand have decreased significantly as compared to their investments in previous years. Since 1999, Japan's investments into ASEAN have fluctuated considerably as seen in Table 14 below.

**Table 14: Details of Japanese FDI into ASEAN (1995-2003)**

### Japan FDI to ASEAN 1995-2003

US\$ millions: Cumulative total\$27,973



Source: ASEAN Secretariat: Statistics of FDI, 6<sup>th</sup> Edition, 2004, BOP basis

From the aforementioned, a noticeable trend of divestments from ASEAN has been observed in the first quarter of 2004. China and India meanwhile have become highly attractive investment destinations (as evidenced by the trends above) due to an abundance of natural and human resources. The total value of Japan's investments into China for 2003 outpaced that of ASEAN, which historically received more FDI from Japan than China. ASEAN nations therefore should start reviving their competitiveness vis-à-vis other Asian nations in order to forestall any foreign divestments, which may follow those which have been noted above for 2004.

# Chapter Three

## Investment Policy Measures and Developments in ASEAN

### Increase Economic Integration

In response to the abovementioned challenges, ASEAN is fast tracking its economic integration efforts to keep up with the pace of other regions and continents. The Americas, and Eastern and Western Europe are all headed towards stronger consolidation. Asia and Oceania, including ASEAN's plus 6 partners have set out on an FTA binge with various trading partners (including individual ASEAN Member Countries). Taking these into consideration, ASEAN is now intensifying its efforts to integrate and move faster towards the formation of a single economic unit.

### Increase competitiveness vis-à-vis China and India

In doing so, ASEAN countries have focused on key areas of competitive advantage to increase investment opportunities. The identification of the 11 priority sectors where ASEAN comparative advantage is said to reside is a noteworthy initial step in this direction of tempering anxieties, boosting competitiveness among ASEAN industries, and providing a solid motivation for the region to accelerate its integration initiatives. Roadmaps have already been drafted as to how each priority sector can be nurtured into regional champions.

Aside from Japan, ASEAN starts to see investors from China and India. These investments are still relatively small in size and are not usually visible in formal statistics. However, the local businessman can feel the presence of these investment activities because of there are more new businesses that are owned and run, for example, by Chinese from PRC.

# Creation of an ASEAN Economic Community

In October of 2003, ASEAN leaders endorsed the Bali Concord II which envisions the creation of an ASEAN Economic Community by the year 2020. This is to realise the ASEAN Vision 2020 to create a “stable, prosperous and highly competitive ASEAN economic region in which there is a free flow of goods, services, investment and a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities in year 2020”. The spirit and letter of the said accord, therefore, calls for the establishment of a “single ASEAN market and production base”.

Another key point in the Bali Concord II that is deserving of particular notice would be its citation of the need to “address the development divide and accelerate the economic integration of Cambodia, Lao PDR, Myanmar, and Viet Nam through IAI and RIA so that the benefits of ASEAN integration are shared and enable all ASEAN Member Countries to move forward in a unified manner.” Recently a number of ASEAN countries have increased the coverage of products to which it extended preferential tariff treatment below the CEPT levels to the four newer members of ASEAN (under the ASEAN Integration System of Preferences or AISP) as a gesture supportive of this campaign.

In a matter of a decade, ASEAN has now attained status as an FTA wherein most tariffs and trade restrictions among member states have already been eliminated and in which each member is still free to set different external tariffs.

## *Focus should be on the 11 priority sectors<sup>15</sup>*

As mentioned above, a stable starting point would be the 11 priority sectors which have already been identified as areas where ASEAN based business can nurture their comparative advantage to gain global competitiveness. Understandably, it is not possible for ASEAN to excel in all economic sectors. The 11 however serve as a common starting point principally to attract investors from within ASEAN.

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<sup>15</sup> The 11 priority sectors are electronics, e-ASEAN, healthcare, wood-based products, automotives, rubber-based products, textiles and apparels, agro-based products, fisheries, air travel and tourism. These sectors were selected on the basis of comparative advantage in natural resource endowments, labour skills and cost competitiveness, and value-added contribution to ASEAN's economy. These selected sectors accounted for more than 50% of intra-ASEAN trade in 2003. In value terms, the priority sectors contributed US\$48.4 billion and US\$43.4 billion of intra-ASEAN exports and imports, respectively, in 2003 (MEDIA RELEASE "ASEAN Accelerates Integration of Priority Sectors", ASEAN Secretariat 29 November 2004)

Policy guidance from governments are now focused on the question of how ASEAN can tilt the balance in favour of these 11 sectors and encourage intra-ASEAN investments to flow thereto. This need not be a distant probability since according to the WIR 2004, investments out of developing countries are on the rise. It says: “outward FDI from developing countries has grown faster over the past 15 years than those from developed countries” with “Asia, led by South, East and South East Asia [which is now] by far the largest outward investor in the developing world”.<sup>16</sup>

## New Investment Measures introduced by ASEAN Member Countries

Aside from the regional initiatives that have so far been formulated and carried out by ASEAN to increase investments and lock-in the gains thereof, each ASEAN Member Country continues to reshape its investment climate in accordance with regionally and multilaterally accepted principles through the new investment measures they enact individually.

These individual measures are encouraged by various regional agreements (e.g. AIA agreement) and multilateral bodies (WTO) to increase the competitiveness of the region in attracting FDI. These include the improvements of the overall investment policy framework, granting of incentives, opening up of sectors for foreign investments, reduction of business cost through lowered taxation, streamlining and simplification of the investment process, and other investment facilitation measures<sup>17</sup>.

The proceeding table enumerates the highlights of recent national policy changes that ASEAN countries have implemented:

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<sup>16</sup> World Investment Report 2004, by UNCTAD p. 20

<sup>17</sup> ASEAN Investment Report 2003

**Table 15: New Investment Measures in ASEAN countries**

<b>Country</b>	<b>Changes</b>
<b>Brunei Darussalam</b>	<p>In 2005, Brunei Darussalam introduced several new measures and policies in relation to FDI:</p> <ol style="list-style-type: none"> <li>1. The development of policies pertaining to the mobile telecommunications sector.</li> <li>2. The establishment of the Brunei Darussalam Tourism Board to further develop the tourism industry as one of the identified priority sectors.</li> <li>3. In addition, pursuant to Brunei Darussalam's commitments under the Trans-Pacific Strategic Economic Partnership (TPSEP), we have undertaken:               <ol style="list-style-type: none"> <li>a. to develop the government procurement sector to ensure more openness and transparency;</li> <li>b. to develop policies conducive to investment in the manufacturing sector.</li> </ol> </li> </ol>
<b>Cambodia</b>	<p>Cambodia became a member of the WTO in October 2004. At present the Royal Government of Cambodia has been focusing on attracting private investment in the following priority fields as follows:</p> <ol style="list-style-type: none"> <li>1. Development of agriculture and agro-industry.</li> <li>2. Development of transport and telecommunication.</li> <li>3. Development of energy and electricity.</li> <li>4. Labor intensive industries and export oriented processing and manufacturing.</li> <li>5. Tourism related industries.</li> <li>6. Human resource development, etc.</li> </ol>

<p><b>Indonesia</b></p>	<p>The government issued a regulation requiring all approvals for foreign investments to be made through one central government agency (BKPM), streamlining the licensing procedures by reducing the bureaucratic process. The purpose of this regulation is to simplify the foreign investment approval process and to restrict regional and local government from adopting their own foreign investment approval requirements.</p> <p>The government also adopted a law facilitating negotiation and settlement of labour disputes between employee and employer in an effort to discourage strikes. This was adopted to address concerns from foreign investors that Indonesian labour laws unduly favour workers.</p>
<p><b>Lao PDR</b></p>	<p>Enacted an amended law on the promotion of foreign investment and the law on the promotion of domestic investment, which provide fair treatment to both local and foreign investors and more attractive incentive schemes such as:</p> <ul style="list-style-type: none"> <li>- Investment of foreign enterprises for up to 50 years and extendable, maybe for a maximum of 75 years.</li> <li>- Corporate income tax exemption up to 7 years, with deducted rates: 20%, 15% and 10%, while on ly flat rate of 20% in the past.</li> <li>- 0% oil import tariff for capital goods (machinery, equipment, etc.), while 1% in the past.</li> <li>- Multiple visa for investors and their family members for up to 5 years, while only up to 1 year in the past.</li> <li>- The same tax rates levied for local and foreign investors.</li> </ul>
<p><b>Malaysia</b></p>	<p>In 2004, further policy initiatives and measures were taken to enhance the business environment for the development and expansion of the manufacturing and related services sector. These include improving the incentive schemes, developing new sources of growth and improving the delivery system to facilitate the process of approvals for investment projects at the federal, state and local government levels.</p>

New incentives introduced include:

- A second round of Pioneer Status/Investment Tax Allowance incentives for existing companies which relocate their manufacturing activities to the promoted areas, to further encourage the flow of investments to areas in the Eastern Corridor of Peninsular Malaysia, Sabah and Sarawak.
- Provision of Accelerated Capital Allowances for a period of two years to companies that incur capital expenses on equipment to maintain quality of power supply.
- Provision of ITA of 100% of qualifying capital expenditure for five years for companies that produce halal food to encourage new modern, updated technology and equipment.
- Provision of accelerated capital allowance from between 4 and 8 years to 1 year for equipment used by companies to generate energy from renewable resources for its own consumption.

To complement the fiscal measures provided by the Government, efforts were also undertaken to upgrade and improve the delivery system, which include:

- Simplification of application forms and procedures for manufacturing licenses, tax incentives.
- Simplification of procedures for application of expatriate posts.
- Measures to assist investors in the implementation of projects.
- Establishment of a coordinating body/one stop shop center at the state level to process and approve applications for building plans and certificate of fitness to enable companies to commence businesses as quickly as possible.

	<p>In 2005, new incentives/ measures introduced include:</p> <ul style="list-style-type: none"> <li>- Removal of the ringgit pegging against the US dollar with a managed float system.</li> <li>- Tax incentives for generation of renewable energy has been enhanced to pioneer status with 100 per cent tax exemptions for a 10 year period or investment tax allowance of 100% on the qualifying capital expenditure incurred within a period of 5 years with the allowance to be offset against 100% (previously 70%) of statutory income for each year of assessment.</li> <li>- Provision of group relief to all locally incorporated resident companies under the Income Tax Act 1967. The group relief is limited to 50% of current year unabsorbed losses to be set-off against the income of another company within the same group subject to certain condition.</li> <li>- Extending the scope of incentives for multimedia activities to companies located outside cybercities.</li> <li>- Extension of the scope of incentives for private higher education institutions to cover the field of science.</li> </ul>
<b>Myanmar</b>	Myanmar has not changed its FDI policy
<b>Philippines</b>	<p>Developments include:</p> <ul style="list-style-type: none"> <li>- Issuance of a Supreme Court ruling allowing 100% foreign ownership of mining companies involved in large-scale exploration, development and utilisation of mineral resources (RA 8942).</li> <li>- Restructuring of the power sector (Electric Power Industry Reform Act of 2001) through the privatization of the National Power Corporation's (NAPOCOR) generation capacity by end-2005.</li> <li>- Aggressive efforts to harmonise and rationalise investment incentives laws, including the approval on second reading in December 2004 of House Bill No. 3295,</li> </ul>

	<p>the Rationalisation of Fiscal Incentives Act, which harmonises and rationalises the fiscal incentives structure by withdrawing all special investment incentives laws that are deemed inefficient, irrelevant and duplicative; and instead, formulating one fiscal incentive law from which all industries draw their incentives.</p> <ul style="list-style-type: none"> <li>- Implementation of reform measured to strengthen fiscal positions and thus improve investor confidence, including the imposition of additional excise tax on alcohol, cigarettes and tobacco products, and on petroleum products; and</li> <li>- Development of capital markets to facilitate the entry of foreign investors to the Philippines including reform measures such as <ul style="list-style-type: none"> <li>a) formulation of a well-developed legal framework to lay down clear and transparent rules that allow widest possible participation by the investing public under proper safeguards (e.g. ease in regulation over cross-border investment);</li> <li>b) further refinement of the taxation of financial transactions to minimise friction costs;</li> <li>c) basic infrastructure for the orderly and efficient trading, clearing and settlement of securities transactions; and</li> <li>d) enhancing the transparency in the market through the improvement of accounting standards and alignment of existing regulations with international standards.</li> </ul> </li> </ul>
<p><b>Singapore</b></p>	<p>Singapore welcomes all forms of enterprise and investment. The government has made the process of setting up and running a business as streamlined as possible.</p> <p>Much of the information needed about doing business in Singapore is available online. A number of programmes have been established by the government and the private sector to help companies improve efficiency, strengthen capabilities and exploit new opportunities in every aspect of their business.</p>

	<p>Recent new initiatives include:</p> <ul style="list-style-type: none"> <li>- Online Business Licensing Service (OBLS) -- the OBLS was launched in 2004 permitting businesses to apply for new licences online. It had a total of 71 licenses available for online application. A new feature called the URT (which stands for Updating, Renewals and Terminations) was launched in October 05 which allowed businesses to update, renew or terminate 45 different types of licences through the OBLS. The OBLS offers time and cost savings to businesses and eliminates the need for them to deal with different government agencies for different licensing services helping to streamline and enhance business operations.</li> <li>- APEC business travel card scheme – This scheme aims to facilitate travel of business persons between APEC economies. Cardholders enjoy benefits such as streamlined processing through designated lanes at the major airports and entry points of participating economies. Pre-cleared cardholders will also be able to travel to and enter participating economies for business purposes up to 60 or 90 days. This was implemented in October 2005.</li> </ul>
<b>Thailand</b>	<p>The Thailand Board of Investment offers special incentive packages for targeted sectors such as automotive and hard-disk drive industries. BOI also sought to strengthen the competitiveness of Thai industries by introducing new criteria to encourage industries to conduct more research and development.</p>
<b>Viet Nam</b>	<p>The State Bank of Vietnam has revised its policy of foreign exchange management in FDI accordingly:</p> <ul style="list-style-type: none"> <li>- Lifting the band limitation on the forward exchange rate of VND/USD that allows bank and other entities to decide on their dealing forward rates. New other derivatives have been introduced and developed in foreign exchange markets such as swaps and options.</li> <li>- Circular No. 03 in May 2004 (promoting provisions on foreign exchange management of stock buying, capital contribution action of foreign investors into Vietnamese</li> </ul>

enterprises) and Decision No. 1550 in December 2004 (promulgating provisions on foreign exchange management for stock exchange investment action of foreign investors on Stock Exchange Transaction Center) allowed foreign investors to invest their funds on OTC and listed stocks. Transferring capital from OTC investment to listed stock investment and vice versa is permitted. Principal capital invested in listed stocks can be transferred abroad without time limitation (which was once required to be kept in Vietnam for a minimum of a year) and the profit from this investment can be used for other consumption purposes in Vietnam. Besides, foreign investors can use the funds after finishing FDI projects in Vietnam to invest in the OTC market or listed stocks in Vietnam.

#### Fiscal and tax issues

- The Ordinance on Personal Income Tax 14/2004 PL-UBTVHQ 11 approved by the Standing Committee of National Assembly stipulates the reduction of personal income tax from 50% down to 40% applicable to the expatriates who live and work in Vietnam. It also increases the taxable income rate of citizens from VND 3 million to VND 5 million.
- Government Decree 152/2004/ND-CP dated 6 August 2004 on amendment of and adjustment to the Decree 164/2003/ND-CP dated 22 December 2003 has amended and adjusted the current provision on corporate income tax applicable to the foreign invested enterprises.
- Government Decree 148/2004/ND-CP dated 6 August 2004 on amendment of and adjusted to the Decree 158/2003/ND-CP dated 22 December 2003 stipulates the new VAT provisions applicable to the export processing enterprises supplying goods and services from domestic to the export processing zones.
- Ministry of Finance issued Official Letter 736/TC-HTQT dated 19 January 2004 providing for the guidelines on the application of CEPT/AFTA tax rates to enterprises in the export processing zones and export processing enterprises in case of selling their goods and products to the domestic market when these satisfy the CEPT eligibility criteria.

### Banking issues

- State Bank of Vietnam grants permission for branches of US and EU banks to mobilize VND up to 400% of the chartered capital applicable to a legal entity and 300% to a legal person. Foreign banks other than the US and EU, are permitted to receive the demand and time deposit up to 50% of the chartered capital in Vietnamese currency. Under consideration is the lifting of this restriction in accordance with Vietnam's WTO accession negotiations.
- Decision No. 293/2004/QD-NHNN dated 22 March 2004 allows foreign branches and joint venture banks to open accounts at Credit Institutions in foreign countries.
- Enactment of Circular 5/2004/TT-NHNN dated 15 September, 2004 providing guidance on the contents of Decree No 159/2003/ND-CP on the supply and use of cheque payment in Vietnam to standardize its system with international practices.

### Technology Transfer

- Decree No. 11/2005/ND-CP dated 2 February 2004 (replacing Decree No. 45/1998/DN-CP) removes limitations and ceilings on the form of payment applicable to technology transfer. It also removes the time of enforcement of the Contract on Technology Transfer and allows parties to agree upon the effective time of payment commencement, and shortens assessment times from 45 working days to 15 working days.

### Trade and Customs

- The Prime Minister has agreed to eliminate the restriction on the quantity of assembled motorcycles imported Vietnam.
- Enactment of Circular No. 07/2004/TT-BTM dated 26 August 2004, providing guidelines on the details of classifying raw materials, capital goods and accessories and spare parts exempted from import tax for 5 years upon the date of commercial production.

- The Ministry of Finance has issued Circular 87/2004/TT-BTC dated 31 August 2004 providing for the detailed price calculation for taxation applied to the imports-exports in compliance with the principles of the WTO.

#### Entry-Exit Visa

- Vietnam has dispensed the entry visa for ordinary passport holders of 6 ASEAN countries including Indonesia, Lao PDR, Malaysia, the Philippines, Thailand and Singapore
- Decision 09/2004/QD-BNG has dispensed with the entry visa for South Korean and Japanese citizens to Vietnam for stays of not more than 15 days. Since 1 May 2005, Vietnam also unilaterally dispensed of the entry visa for citizens of Scandinavian countries visiting for less than 15 days.

#### Cost of Business

- Since 1 January 2004, similar prices of air tickets have been made to apply for both Vietnamese citizens and foreigners.
- The enactment of Decision 17/2004/QD-BCVT has reduced telecommunications charges to levels charged by other countries in the region resulting in an average reduction of 22% in costs, 25%-26% for internet service costs.
- Directive 215/2004QD-TT dated 28 December 2004 applied a single price for the sale of electricity to both domestic and foreign enterprises.

#### Industrial Development

- Directive No 47/CT-TTg dated 22 December 2004 issued pursuant to the Law on Electricity approved by the National Assembly committing to eliminating restrictions on foreign capital invested in the field of electricity production.



## SEVENTH ASEAN INVESTMENT AREA (AIA) COUNCIL MEETING

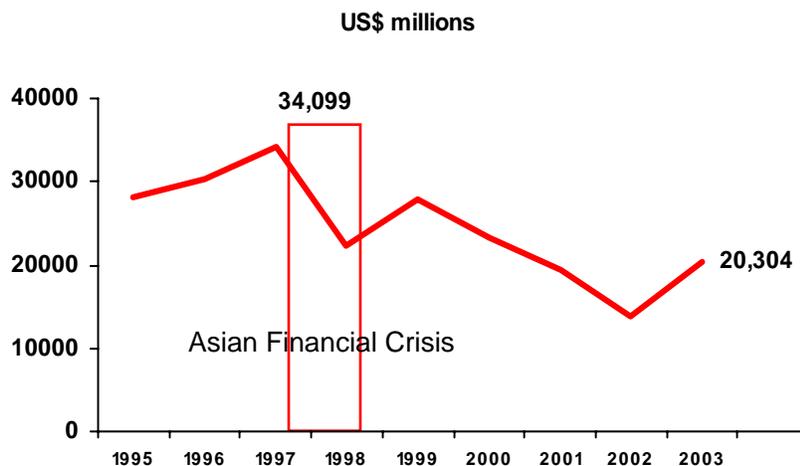
### JOINT MEDIA STATEMENT

2 September 2004, Jakarta, Indonesia

#### Significant FDI Rebound in ASEAN

1. The Seventh AIA Council met on 2 September 2004 in Jakarta, Indonesia. Reviewing the developments in investments over the past year, the Council was pleased to note the significant rebound in ASEAN FDI for the year ending 2003, making the region one of the largest FDI destinations. The Council was encouraged by the 48% year-on-year increase in FDI flows<sup>1</sup> to US\$20.3 billion, underscoring the region's resilience despite the many challenges encountered in 2003 (refer to Figure 1).

Figure 1. FDI flows to ASEAN 1996-2003

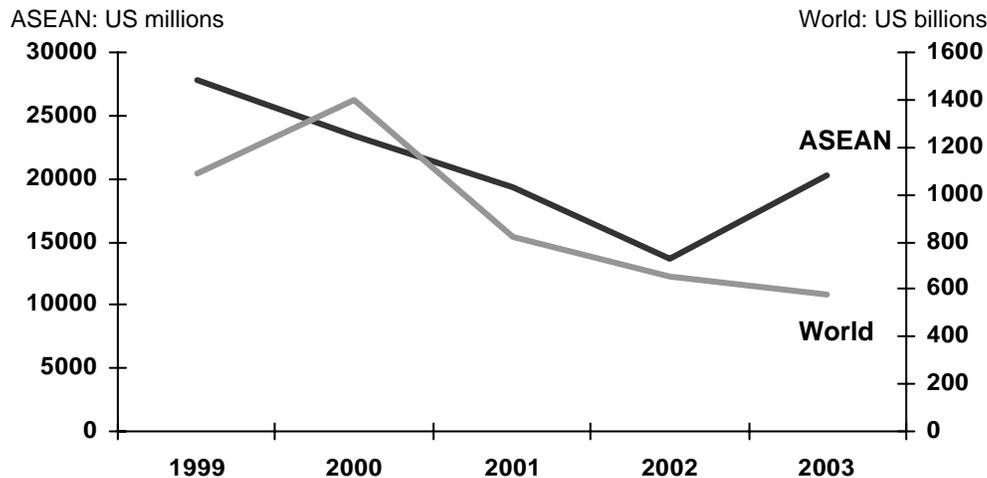


Source: ASEAN Secretariat: Statistics of FDI in ASEAN, 6<sup>th</sup> Edition, 2004, BOP basis

2. FDI flows were mainly into financial intermediation (27%), manufacturing (23%), mining and quarrying (20%) and trade/commerce (11%). Furthermore, the Council noted that the increase was achieved despite global FDI flows decreasing consecutively for the past three years, e.g., declining 12% in 2003 to US\$575 billion (refer to Figure 2).

<sup>1</sup> All FDI data refers to BOP basis unless otherwise stated

**Figure 2. ASEAN and Global FDI Trend**



Source: ASEAN Secretariat: Statistics of FDI in ASEAN, 6<sup>th</sup> Edition, 2004, EIU, World Investment Prospects, 2004

3. The Council also noted that FDI for the year ending 2004 is likely to further improve, given that preliminary data for the 1<sup>st</sup> Quarter of 2004 yielded FDI flows of US\$7.3 billion, which is a 188% increase over FDI flows in the same period in 2003.

4. The top 10 investors contributed 78 % of total ASEAN FDI in 2003. United Kingdom, Netherlands, United States, intra-ASEAN and Japan, in that order, dominated flows to the region.

5. The improved global demand for ICT products, the successful privatisation of assets and an increase in oil investment in some ASEAN Member Countries contributed to the overall improved regional situation. Improving corporate profitability of firms listed in U.S. Fortune 500 that are operating in ASEAN allowed firms to reinvest earnings, which have been consistently high and increasing in the region (37%<sup>2</sup> of total FDI flows to ASEAN between 1995-2002), to reduce their financial exposure, resulting in marked increases in the marginal rate of return of many MNCs.

6. The Council also recognised the importance of intra-ASEAN FDI, which have been consistently over US\$2billion annually for the last three years. This comprised both Greenfield investments and intra-regional cross-border Mergers & Acquisitions.

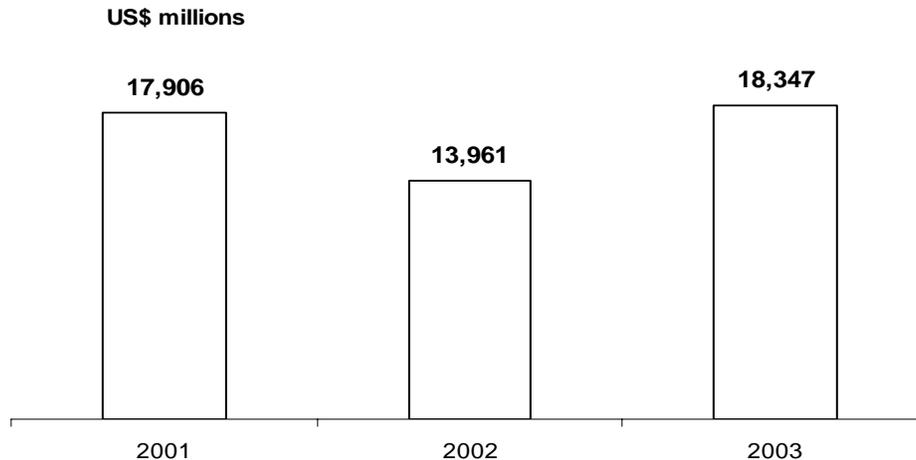
### **Rise in Approved Manufacturing FDI**

7. In tandem with the overall improvement in ASEAN FDI, approved manufacturing FDI in 2003 increased to US\$18 billion, representing a 29% year-on-year growth from the amount of US\$14 billion recorded in 2002 (refer to Figure 3). The increase reinforces the region as a growing and important manufacturing base. The top five FDI sectors in

<sup>2</sup> Reinvested earnings as a percentage of FDI composition in 1995-2002 averaged about 15% for the world, 12% in Eastern Europe and Central Asia, 11% in Latin America and the Caribbean, Source: World Investment Report, UNCTAD, 2003.

manufacturing were refined petroleum products, electrical and electronics, basic metals, transport equipment and wood products.

**Figure 3. Approved Manufacturing FDI in ASEAN**



Source: ASEAN Secretariat: Statistics of FDI in ASEAN, 6<sup>th</sup> Edition, 2004, Apportionment basis

### **Progress in the Implementation of the AIA and beyond**

8. The Council noted the continued progress and efforts made in advancing the AIA process. During the past year, efforts were undertaken to promote awareness of the development in ASEAN's supporting industries and enhance the understanding of transnational corporations' strategies. Some Member Countries have unilaterally reviewed their Temporary Exclusion Lists and Sensitive Lists in the AIA and submitted revised lists. In addition, to provide up-to-date information on ASEAN's investment situation, the 2003 FDI data set was released and the data set for 1<sup>st</sup> half 2004 will be released by year-end.

9. The Council welcomed the initiative of the ASEAN Business Advisory Council (ABAC) in successfully concluding the First ASEAN Business and Investment Summit in October 2003, in Bali, Indonesia, in cooperation with the Coordinating Committee on Investments (CCI). The Council acknowledged the role of ABAC in contributing towards the region's efforts in deepening economic integration.

10. The Council welcomed the successful convening of the First CCI-Japan Investment Consultation in May 2004. The Council noted the importance of holding such consultations and reaffirmed its commitment to supporting future consultations with Japan and other ASEAN dialogue partners.

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Attendance:

The Seventh AIA Council Meeting was chaired by **H.E. Rini M. Sumarno Soewandi, Minister of Industry and Trade, Indonesia** and attended by:

**Mr. Lim Jock Hoi**

Director-General  
International Relations and Trade Development Division  
Ministry of Industry and Primary Resources  
Brunei Darussalam

**H.E. Mr. Kong Vibol**

First Secretary of State of Economy and Finance  
Cambodia

**H.E. Dr. Liane Thikeo**

Deputy Minister  
Committee for Planning and Investment  
Lao PDR

**H.E. Dato' Ahmad Husni Mohamad Hanadzlah**

Deputy Minister  
Ministry of International Trade and Industry  
Malaysia

**H.E. U Tin Winn**

Minister for Economic Cooperation  
Myanmar

**H.E. Dr. Thomas G. Aquino**

Undersecretary of Trade and Industry  
Philippines

**H.E. Mr. Lim Hng Kiang**

Minister for Trade and Industry  
Singapore

**Mr. Satit Sirirangkamanont**

Deputy Secretary-General  
Office of the Board of Investment  
Thailand

**H.E. Mr. Phan Huu Thang**

Ministerial Level  
Head of Foreign Investment Agency  
Ministry of Planning and Investment  
Viet Nam

**H.E. Mr. Ong Keng Yong**

Secretary-General of ASEAN



## **THE THIRTY SIXTH ASEAN ECONOMIC MINISTERS MEETING**

### **JOINT MEDIA STATEMENT**

**3 September 2004, Jakarta, Indonesia**

1. The Thirty-Sixth Meeting of the ASEAN Economic Ministers was held on 3 September 2004 in Jakarta, Indonesia. The Meeting was preceded by a Preparatory ASEAN Senior Economic Officials Meeting (SEOM), the Seventh ASEAN Investment Area (AIA) Council Meeting and the Eighteenth ASEAN Free Trade Area (AFTA) Council Meeting.

#### **Opening Ceremony**

2. The Meeting was formally opened by H.E. Megawati Soekarnopoetri, President of the Republic of Indonesia. In her opening statement, she highlighted that in achieving the goal of an ASEAN Economic Community by 2020, much effort must be placed in realizing a rules-based economic system, where business activities will be guided by an adequate set of internationally accepted, transparent and consistent market-based investment and trading rules and practices.

3. She stressed that ASEAN economic integration is not so much a matter of policy but of commitment. Thus, she urged the Ministers to break the psychological barrier of national interests in order to achieve real progress in economic integration. On the other hand, while ASEAN is improving its competitiveness as an economic region, equal attention must be given to engaging the global economy in order to further develop economic ties with major trading partners and to possibly pursue Free Trade Agreements with them.

4. Recognizing that the rest of the Asia-Pacific region and the world at large are observing ASEAN, she urged the Ministers to find ways to boost regional trade and accelerate economic integration and show the world ASEAN's unified strength in achieving the ASEAN Economic Community.

#### **Economic performance**

5. The Ministers noted that despite the unfavourable external outlook and against the background of a slowdown in global FDI flows, FDI flows to ASEAN increased by 48%, up from \$ 13.7 billion in 2002 to \$20.2 billion in 2003, resulting in ASEAN being

one of the highest FDI growth regions. The overall improved ASEAN investment environment and strong regional economic growth and integration increased the attractiveness of ASEAN to foreign investors. The strong increase in 2003, which was the highest since 2000, and the bullish outlook for 2004 suggest that the 1997-1998 financial crisis is no longer a major influence on multinational companies' considerations relating to investment in ASEAN. The FDI stock in the region is estimated to have increased by 85% since 1995, up from \$176.1 billion in that year to \$326.4 billion in 2003.

6. In 2004, the FDI flow to the region is encouraging and is expected to reach US\$24 billion. The main beneficiaries are the manufacturing and services sectors. Strong intra-regional investment, an improved global and regional economic situation, along with sound corporate profitability and more favourable business prospects contributed to this bullish outlook.

7. ASEAN's trade performance grew significantly in 2003. Total ASEAN exports grew by 12.12% from US\$ 383.85 billion in 2002 to US\$ 430.39 billion in 2003. Total ASEAN imports grew by 9.51% or from US\$ 328.11 billion in 2002 to US\$ 359.32 billion in 2003.

8. Intra-ASEAN exports grew higher than the total ASEAN exports. The overall growth was 15.4% or in value term it grew from US\$ 86.39 billion in 2002 to US\$ 99.7 billion in 2003. Regarding the intra-ASEAN imports, it had experienced modest growth in 2003, from US\$ 72.23 billion in 2002 to US\$ 74.49 billion in 2003.

### **ASEAN Economic Community**

9. The Ministers reviewed the steps taken to implement the decisions of the 9<sup>th</sup> ASEAN Summit, in particular the realization of the ASEAN Economic Community (AEC) by 2020. They noted the progress made towards the realization of the AEC through measures that reinforce the implementation of its existing economic initiatives; accelerate regional integration in eleven priority sectors; facilitate movement of business persons, skilled labour and talents; and strengthen the institutional mechanisms of ASEAN, including improvement of the existing ASEAN Dispute Settlement Mechanism to ensure expeditious and legally binding resolution of any economic disputes.

### **Effective Dispute Settlement System**

10. The Ministers noted the progress made in finalizing the enhanced and effective dispute settlement system in ASEAN. The Ministers were pleased to note that as part of the new arrangement for this purpose: (i) a legal unit was established at the ASEAN Secretariat to provide legal advice on trade disputes (advisory mechanism), (ii) an ASEAN Consultation to Solve Trade and Investment Issues (ACT) - a non-binding internet-based problem-solving network to resolve complaints within 30 days is ready to provide speedy resolution to operational problems in ASEAN

economic agreements (consultative mechanism), and (iii) an ASEAN Compliance Body (ACB) has been formed wherein ASEAN member countries can make use of the mediation and peer pressure in dispute resolution. The ACB could ensure that cases lodged before the ACB should be resolved within 90 days.

11. The Ministers approved in-principle the latest draft of the Protocol on Enhanced ASEAN DSM scheduled for signing during the ASEAN Summit in November 2004 in Vientiane. The revised Protocol modeled after the WTO DSU would ensure that binding decisions can be made based solely on legal considerations and all expeditiously enforced.

### **Priority Integration Sectors**

12. The Ministers endorsed the Framework Agreement for the Integration of the Priority Sectors for signing by the Leaders during the 10<sup>th</sup> ASEAN Summit in November 2004. The Ministers also endorsed the respective draft ASEAN Sectoral Integration Protocols and the Roadmaps for Integration of the Priority Sectors for signing in Vientiane during the 10<sup>th</sup> ASEAN Summit in November 2004.

13. The implementation of the measures in the roadmaps and related documents on a priority basis will enable the progressive, expeditious and systematic integration of the priority sectors in ASEAN.

14. The Ministers urged all relevant ASEAN bodies to implement the measures identified and tasked their senior officials to monitor the progress and regularly report it to them to ensure full integration of these sectors by 2010.

### **Services**

15. The Ministers endorsed the conclusion of the fourth package of commitments for the third round of negotiations and signed the Protocol to implement this package of commitments. The Protocol will further eliminate substantial restrictions to trade in services among Member Countries and liberalise trade in services by expanding the depth and scope of liberalisation beyond those undertaken by Member Countries under the General Agreement on Trade in Services (GATS) of the World Trade Organisation (WTO).

16. The Ministers agreed to launch the fourth round of negotiations beginning 2005 and ending in two years time, covering all sectors and modes of supply. The Ministers tasked the senior officials to set clear target and parameters to guide the next and subsequent rounds of negotiations under the ASEAN Framework Agreement on Services in order to achieve free flow of services in ASEAN earlier than 2020.

### **Standards and Conformance**

17. The Ministers were pleased to note the completion of the harmonization work for 71 standards for safety and 10 standards for Electromagnetic Compatibility (EMC). This will facilitate intra-ASEAN trade and increase market access of electrical and electronic products produced in ASEAN. They were satisfied with the progress in the implementation of mutual recognition arrangements (MRAs) to avoid duplication test and certification in ASEAN.

### **Industrial cooperation**

18. The Ministers noted that as of 6 August 2004, 126 out of 183 AICO applications have been approved. These approved AICO arrangements are estimated to generate US\$1,482 million trade transactions per year. The Ministers agreed to extend the waiver on the 30 percent national equity requirement for AICO applications until 31 December 2005.

### **WTO**

19. The Ministers welcomed the agreement reached on 1 August 2004 for a new framework agreement under the Doha Development Agenda, which pushes ahead multilateral trade negotiations in five areas, namely agriculture, non-agricultural market access (NAMA), development issues, trade facilitation and services.

20. The Ministers renewed their commitment to strengthen the rules-based multilateral trading system. They re-emphasized the need to take full account of developing countries' special needs and development concerns to better integrate the development dimensions into the multilateral trading system. In this context, the Ministers pledged to work with all members of the WTO, in particular on the importance of WTO capacity building as a means to better enable developing countries to reap the full benefits of their WTO, for the success of the sixth WTO Ministerial Conference to be held in Hong Kong in December 2005.

21. The Ministers re-affirmed their support for the expeditious accession of Laos and Viet Nam into the WTO and urged that appropriate assistance be extended by the WTO to facilitate their accession.

### **ASEAN Trade Fair 2004 and the 2<sup>nd</sup> ASEAN Business and Investment Summit**

22. The Ministers were pleased with the preparations for the upcoming ASEAN Trade Fair 2004 and the 2<sup>nd</sup> ASEAN Business and Investment Summit, which will be held on 6-10 October 2004 in Ha Noi, Viet Nam and in November 2004 in Vientiane, Lao PDR, respectively. The Ministers emphasized the importance of such events to further promote private sector development around the region, and therefore encouraged the business community from ASEAN Member Countries as well as ASEAN Dialogue Partners to actively participate in these events.

## LIST OF ASEAN ECONOMIC MINISTERS

- (i) **H.E. Ms. Rini M.S. Soewandi**, Minister of Industry and Trade, Indonesia; AEM Chairperson
- (ii) **H.E. Pehin Dato Abdul Rahman Taib**, Minister of Industry and Primary Resources, Brunei Darussalam
- (iii) **H.E. Mr. Cham Prasidh**, Senior Minister and Minister of Commerce, Cambodia;
- (iv) **H.E. Mr. Soulivong Daravong**, Minister of Commerce, Lao PDR;
- (v) **H.E. Dato' Seri Rafidah Aziz**, Minister of International Trade and Industry, Malaysia;
- (vi) **H.E. U Tin Winn**, Minister for Economic Cooperation, Myanmar;
- (vii) **H.E. Dr. Thomas G. Aquino**, Undersecretary of Trade and Industry, Philippines;
- (viii) **H.E. Mr. Lim Hng Kiang**, Minister for Trade and Industry, Singapore;
- (ix) **H.E. Mr. Watana Muangsook**, Minister of Commerce, Thailand;
- (x) **H.E. Mr. Truong Dinh Tuyen**, Minister of Trade, Viet Nam;
- (xi) **H.E. Mr. Ong Keng Yong**, Secretary-General of ASEAN.

**Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments  
Manila, 15 December 1987**

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The Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand, hereinafter referred to as the Contracting Parties;

**CONSIDERING** that the Heads of Government of ASEAN agreed inter alia on industrial cooperation among the, member states of ASEAN in the Declaration of ASEAN Concord signed at Denpasar, Bali on 24 February 1976;

**FURTHER CONSIDERING** that the Heads of Government of ASEAN in their Meeting in Kuala Lumpur on 4 to 5 August 1977, recognized inter alia that the acceleration of industrialization of the region requires the increased flow of technology and investments, and toward the attainment of this common objective, directed that measures be taken to stimulate the flow of technology, knowhow and private investments among the member states. and directed, in particular, the study of a regional mechanism, and the formulation of guidelines, which would facilitate such desired flow of technology, knowhow and private investments;

**DESIRING** that appropriate measures be taken to carry out the foregoing intents and to create favourable conditions for investments by nationals and companies of any ASEAN member state in the territory of the other ASEAN member states and to facilitate the desired flow of private investments therein to increase prosperity in their respective territories;

**RECOGNIZING** that an agreement on the promotion and protection of such investments will contribute to the furtherance of the above mentioned purposes;

**HAVE AGREED AS FOLLOWS:**

**Article I  
DEFINITION**

For the purpose of this Agreement:

1. The term "nationals" shall be as defined in the respective Constitutions and laws of each of the Contracting Parties.

2. The term "company" of a Contracting Party shall mean a corporation, partnership or other business association, incorporated or constituted under the laws in force in the territory of any Contracting Party wherein the place of effective management is situated.
3. The term "investment" shall mean every kind of asset and in particular shall include, though not exclusively:
  - a) movable and immovable property and any other proper rights such as mortgages, liens and pledges;
  - b) shares, stocks and debentures of companies or interests in the property of such companies;
  - c) claims to money or to any performed under contract having a financial value;
  - d) intellectual property rights and goodwill;
  - e) business concessions conferred by law or under contract, including concessions to search for, cultivative, extract, or exploit natural resources.
4. The term "earnings" shall mean amounts yielded by an investment, particularly, though not exclusively, profits, interest, capital gains, dividends, royalties or fees.
5. The term "freely usable currency" shall mean the United States Dollar, Pound Sterling, Deutschmark French Franc, Japanese Yen, or any other currency that is widely used to make payments for international transactions and is widely traded in the principal exchange-markets.
6. The term "host country" shall mean the Contracting Party wherein the investment is made.

## **Article II APPLICABILITY OR SCOPE**

1. This Agreement shall apply only to investments 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 which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement.
2. This Agreement shall not affect the, rights and obligations of the Contracting, Parties with respect to investments which, under the provisions of paragraph 1 of this Article, do not fall within the scope of the Agreement.

3. This Agreement shall also apply to investments made prior to its entry into force, provided such investments are specifically approved in writing and registered by the host country and upon such-conditions as it deems fit for purpose of this Agreement subsequent in its entry into force.

### **Article III GENERAL OBLIGATIONS**

1. Each Contracting Party shall, in a manner consistent with its national objectives, encourage and create favourable conditions in its territory for investments from the other Contracting Parties. All investments to which this Agreement relates shall, subject to this Agreement, be governed by the laws and regulations of the host country, including rules of registration and valuation of such investments.
2. Investments of nationals or companies of and obligations Party in the territory of other Contracting Parties shall at all times be accorded fair and equitable treatment and shall enjoy full protection and in the territory of the host country.
3. Each Contracting Party shall observe any obligation arising from a particular commitment it may have entered into Title with regard to a specific investment of nationals or companies of the other Contracting Parties.

### **Article IV TREATMENT**

1. Each Contracting Party shall, within its territory ensure full protection of the investments made in accordance with its legislation by investors of the other Contracting Parties and shall not impair by unjustified or discriminatory measures the management, maintenance, use, enjoyment, extension, disposition or liquidation of such investments.
2. All investments made by investors of any Contracting Party shall enjoy fair and equitable treatment in the territory of any other Contracting Party. This treatment shall be no less favourable than that granted to investor of the most-favoured-nation.
3. Investor of any Contracting Party who within the territory of another Contracting Party suffer damages in relation to their investment activities - in connection with their investments, owing to the outbreak of hostilities or a state of national emergency, shall be accorded treatment no less favourable than that accorded to investors of any - third country, as regards restitution, compensation or other valuable consideration Payments made under this provision shall be effectively realizable and freely transferable, subject to Article VII.

4. Any two or more of the Contracting Parties may negotiate to accord national treatment within the framework of this Agreement. Nothing herein shall entitle any other party to claim national treatment under the most-favoured-nation principle.

#### **Article V EXCEPTION**

The Provision of this Agreement shall not apply to matters of taxation in the territory of the Contracting Parties. Such matters shall be governed by Avoidance of Double Taxation between Contracting Parties and the domestic laws of each Contracting Party.

#### **Article VI EXPROPRIATION AND COINIPENSATION**

1. Investments of nationals or companies of any Contracting Party shall not be subject to expropriation nationalisation or any measure equivalent thereto (in the article referred to as "expropriation"), except for public use, or public purpose, or in the public interest, and-under due process of law, on a non-discriminatory basis and upon payment of adequate compensation. Such compensation shall amount to the market value of the investments affected, immediately before the measure of dispossession became public knowledge and it shall be freely transferable in freely-usable currencies from the host country. The compensation shall be settled and paid without unreasonable delay. The national or company affected shall have the right, under the law of Contracting Party making the expropriation, to prompt review by a judicial body or some other independent authority of that Contracting Party in accordance with principles set out in this paragraph.
2. Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in its territory, and in which nationals or companies of another Contracting Party own shares, it shall apply the provisions of paragraph 1 of this Article so as to ensure the compensation provided for in that Paragraph to such nationals or companies to the extend of their interest in the assets expropriated.

#### **Article VII REPATRIATION OF CAPITAL AND EARNINGS**

1. Each Contracting Party shall, subject to its laws, rules and regulations, allow without unreasonable delay the free transfer in any freely- usable currency of:
  - a) the capital, net profits, dividends, royalties, technical assistance and technical fees, interests and other income, accruing from any investments of the nationals or companies of the other Contracting

Parties;

- b) the proceeds from the total or partial liquidation of any investments made by nationals or companies of the other Contracting Parties;
  - c) funds in repayment of loans given by nationals or companies of one Contracting Party to the nationals or companies of another Contracting Party which both Contracting Parties have recognized as investments;
  - d) the earnings of nationals of the other Contracting Parties who are employed and allowed to work in connection with an investment in its territory.
2. The exchange rate applicable to such transfer shall be the rate of exchange prevailing at the time of remittance.
  3. The Contracting Parties undertake to accord to transfers referred to in paragraph (1) of this Article a treatment no less favourable than that accorded to transfer originating from investments made by nationals or companies of any third State.

#### **Article VIII SUBROGATION**

If any of the Contracting Parties makes payment to any of its nationals or companies under a guarantee it has granted in respect of an investment made in the territory of another Contracting Party, the latter Contracting Party shall, without prejudice to the rights of the former Contracting Party under Article IX and X, recognize the assignment of any right title or claim of such national or company to the former Contracting Party and the subrogation of the former Contracting Party to any such right, title or claim. This, however, does not necessarily imply a recognition on the part of the latter Contracting Party of the merits of any case or the amount of any claim arising therefrom.

#### **Article IX DISPUTE BETWEEN THE CONTRACTING PARTIES**

1. Any dispute between and among, the Contracting Parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled amicably between the parties to the dispute. Such settlement shall be reported to the ASEAN Economic Ministers (AEM).
2. If such a dispute cannot thus be settled it shall be submitted to the AEM for resolution.

## **Article X ARBITRATION**

1. Any legal dispute arising directly out of an investment between any Contracting Party and a national or company of any of the other Contracting Parties shall, as far as possible, be settled amicably between the parties to the dispute.
2. If such a dispute cannot thus be settled within six months of its being raised, then either party can elect to submit the dispute for conciliation or arbitration and such election shall be binding on the other party. The dispute may be brought before the International Centre for Settlement of Investment Disputes (IGSID), the United Nations Commission on International Trade Law (UNCITRAL), the Regional Centre for Arbitration at Kuala Lumpur or any other regional centre for arbitration in ASEAN, whichever body the parties to the dispute mutually agree to appoint for the purposes of Conducting the arbitration.
3. In the event that the parties cannot agree within a period of three months on a suitable body for arbitration, an arbitral tribunal consisting of three members shall be formed. The Parties to the dispute shall appoint one member each, and these two members shall then select a national of a third Contracting Party to be the chairman of the tribunal, subject to the approval of the parties to the dispute. The appointment of the members and the chairman shall be made within two months and three months respectively, from the date a decision to form such an arbitral tribunal is made.
4. If the arbitral tribunal is not formed in the periods specified in paragraph 3 above, then either party to the dispute may, in the absence of any other relevant arrangement request the President of the International Court of Justice to make the required appointments.
5. The arbitral tribunal shall reach its decisions by a majority of votes and its decisions shall be binding, The Parties involved in the dispute shall bear the cost of their respective members to the arbitral tribunal and share equally the cost of the chairman and other relevant costs. In all other respects, the arbitral tribunal shall determine its own procedures.

## **Article XI CONSULTATION**

The Contracting Parties agree to consult each other at the request of any Party on any matter relating to investments covered by this Agreement, or otherwise affecting the implementation of this Agreement.

**Article XII  
AMENDMENTS**

All articles of this Agreement may be modified through amendments in writing to this Agreement agreed upon by consensus. All amendments shall become effective upon acceptance by all Contracting Parties.

**Article XIII  
ENTRY INTO FORCE**

1. This Agreement shall enter into force on the 30th day after the deposit of the sixth Instrument of Ratification and shall thereafter remain in force for a period of the years.
2. This Agreement shall thereafter continue in force unless terminated by any Contracting Party giving not less than six months written notice through diplomatic channels. Provided however, that in respect of investments made while the Agreement was in force, its provisions shall continue in effect with respect to such investments for a period of ten years after the date of termination, and without prejudice to the application thereafter of the rules of international law.

**Article XIV  
MISCELLANEOUS PROVISIONS**

1. This Agreement may not be signed with reservation nor shall reservations be admitted at the time of ratification.
2. This Agreement shall be deposited with the Secretary-General of the ASEAN Secretariat who shall promptly furnish a certified copy thereof to each Contracting Party.
3. Each Contracting Party shall deposit its instrument of Ratification with Secretary-General of the ASEAN Secretariat who shall promptly inform each Contracting Party of such deposit.

**IN WITNESS WHEREOF**, the undersigned, duly authorized thereto by their respective Governments, have signed this Agreement.

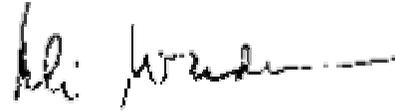
**DONE** in Manila, Philippines this Fifteenth day of December Nineteen Hundred Eighty Seven in one original copy in the English Language.

For the Government of Brunei Darussalam :



**PG. DATO DR. HJ. ISMAIL PG. HJ. DAMIT**  
Minister of Development

For the Government of  
the Republic of Indonesia :



**ALI WARDHANA**  
Minister Coordinator for Economy, Finance,  
Industry, and Development Supervision

For the Government of Malaysia :



**DATIN PADUKA RAFIDAH AZIZ**  
Minister of Trade and Industry

For the Government of the  
Republic of Singapore :



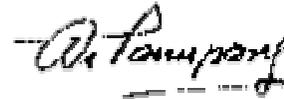
**RICHARD HU TSU TAU**  
Minister for Finance

For the Government of the  
Republic of the Philippines :



**JOSE S. CONCEPCION, JR.**  
Secretary of Trade and Industry

For the Government of the  
Kingdom of Thailand :



**DR. ARUN PANUPONG**  
Minister Attached to the  
Prime Minister's Office

**Protocol to Amend the Agreement among the Governments of Brunei Darussalam,  
the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of  
Singapore, and the Kingdom of Thailand  
for the Promotion and Protection of Investments  
Jakarta, 12 September 1996**

The Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand, and the Socialist Republic of Vietnam;

REFERRING to Article XII of the Agreement among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments signed on 15 December 1987 in Manila, hereinafter referred to as "the Agreement";

RECALLING the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Singapore on 28 January 1992 which acknowledged the importance of sustaining economic growth and development in all Member States through joint efforts in liberalising trade and promoting intra-ASEAN trade and investment flows;

MINDFUL of the agreement to establish an ASEAN Free Trade Area (AFTA) with the aim to encourage greater investment flows into the region;

BEARING IN MIND the decision of the Fifth ASEAN Summit held on 15 December 1995 and the subsequent work within ASEAN to establish an ASEAN Investment Area (AIA) in order to enhance the area's attractiveness and competitiveness for promoting direct investment, as well as to implement, among other investment measures, an ASEAN Plan of Action on Cooperation and Promotion of Foreign Direct Investment and Intra-ASEAN Investment;

NOTING that the Government of the Socialist Republic of Vietnam had become a member of ASEAN on 28 July 1995 and had agreed to subscribe or accede, as the case may be, to all Declarations, Treaties and Agreements in ASEAN, and that the Socialist Republic of Vietnam had, on 16 August 1996, acceded to the Agreement by depositing its instrument of accession with the Secretary-General of ASEAN and thereby became a party to the Agreement;

RECOGNISING the need to update the Agreement to reflect the rapid development in the global investment environment and the commitment which Member Countries had offered under the various international and regional investment agreements; and

ACKNOWLEDGING the importance of investment as a source of finance for sustaining the pace of economic, industrial and technological development of the region;

HAVE AGREED ON FOLLOWS:

#### ARTICLE 1

The title of the Agreement shall be amended to read as "The ASEAN Agreement for the Promotion and Protection of Investments."

#### ARTICLE 2

The following shall be inserted after Article III as a new Article III-A to the Agreement:

"Simplification of Investment Procedures and Approval Process

Each Contracting Party shall endeavour to simplify and streamline its investment procedures and approval process to facilitate investment flows."

#### ARTICLE 3

The following shall be inserted after the new Article III-A as a new Article III-B to the Agreement:

"Transparency and Predictability

Each Contracting Party shall ensure the provision of up-to-date information on all laws and regulations pertaining to foreign investment in its territory and shall take appropriate measures to ensure that such information be made as transparent, timely and publicly accessible as possible."

#### ARTICLE 4

Article IX of the Agreement shall be substituted with the following:

"Dispute Between the Contracting Parties

The provisions of the ASEAN Dispute Settlement Mechanism shall apply to the settlement of disputes under the agreement."

## ARTICLE 5

Article X of the Agreement shall be renamed as "Dispute Between Contracting Parties and Investors of Other Contracting Parties."

## ARTICLE 6

The following shall be inserted after Article XI as a new Article XI-A to the Agreement:

### "Accession of New Members

New Members of ASEAN shall accede to the Agreement by depositing their instruments of accession with the Secretary-General of ASEAN.

For new Members of ASEAN who accede to the Agreement, it shall enter into force on the date of the deposit of the instrument of accession."

## ARTICLE 7

This Protocol shall enter into force on the date of deposit of the instruments of ratification or acceptance by all signatory governments with the Secretary-General of ASEAN.

This Protocol shall be deposited with the Secretary-General of ASEAN, who shall promptly furnish a certified copy thereof to each Member Country.

IN WITNESS THEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed the Protocol to Amend the Agreement among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments.

DONE at Jakarta, this 12th day of September 1996 in a single copy in the English Language.

For the Government of Brunei Darussalam :



**ABDUL RAHMAN TAIB**  
Minister of Industry and Primary Resources



**HARTARTO SASTROSOENARTO**  
Coordinating Minister for Production and Distribution

For the Government of Malaysia:



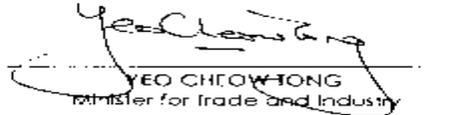
**RAFIDAH AZIZ**  
Minister of International Trade and Industry

For the Government of the Republic of the Philippines :



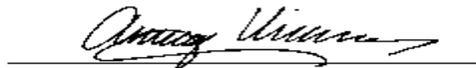
**CESAR B. BAUTISTA**  
Secretary of Trade and Industry

For the Government of the Republic of Singapore:



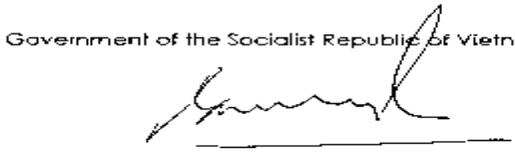
**YEO CHEOW TONG**  
Minister for Trade and Industry

For the Government of the Kingdom of Thailand:

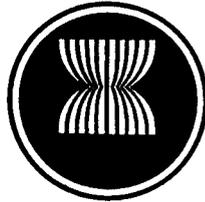


**AMNUAY VIRAVAN**  
Deputy Prime Minister and Minister of Foreign Affairs

For the Government of the Socialist Republic of Vietnam:



**LE VAN TRIET**  
Minister of Trade



## **FRAMEWORK AGREEMENT ON THE ASEAN INVESTMENT AREA**

**The Governments of Brunei Darussalam, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Vietnam, Member States of the Association of South-East Asian Nations (ASEAN);**

**REAFFIRMING** the importance of sustaining economic growth and development in all Member States through joint efforts in liberalising trade and promoting intra-ASEAN trade and investment flows enshrined in the Framework Agreement on Enhancing ASEAN Economic Co-operation signed in Singapore on 28 January 1992;

**RECALLING** the decision of the Fifth ASEAN Summit held on 15 December 1995 to establish an ASEAN Investment Area (hereinafter referred to as "AIA"), in order to enhance ASEAN's attractiveness and competitiveness for promoting direct investments;

**AFFIRMING** their commitment to the 1987 ASEAN Agreement for the Promotion and Protection of Investments and its 1996 Protocol to enhance investor confidence for investing in ASEAN;

**MINDFUL** of the decision to establish an ASEAN Free Trade Area (AFTA) and the implementation of the ASEAN Industrial Co-operation (AICO) Scheme, to encourage greater investment flows into the region;

**RECOGNISING** that direct investment is an important source of finance for sustaining the pace of economic, industrial, infrastructure and technology development; hence, the need to attract higher and sustainable level of direct investment flows in ASEAN;

**DETERMINED** to realise the vision of ASEAN to establish a competitive ASEAN Investment Area through a more liberal and transparent investment environment by 1st January 2010; and

**BEARING IN MIND** that the measures agreed upon to establish a competitive ASEAN Investment Area by 2010 shall contribute towards ASEAN Vision 2020.

**HAVE AGREED AS FOLLOWS:**

**ARTICLE 1**

**Definition**

For the purpose of this Agreement:

"ASEAN investor " means -

- (i) a national of a Member State; or
- (ii) any juridical person of a Member State,

making an investment in another Member State, the effective ASEAN equity of which taken cumulatively with all other ASEAN equities fulfills at least the minimum percentage required to meet the national equity requirement and other equity requirements of domestic laws and published national policies, if any, of the host country in respect of that investment.

For the purpose of this definition, equity of nationals or juridical persons of any Member State shall be deemed to be the equity of nationals or juridical persons of the host country.

"effective ASEAN equity" in respect of an investment in an ASEAN Member State means ultimate holdings by nationals or juridical persons of ASEAN Member States in that investment. Where the shareholding/equity structure of an ASEAN investor makes it difficult to establish the ultimate holding structure, the rules and procedures for determining effective equity used by the Member State in which the ASEAN investor is investing may be applied. If necessary, the Co-ordinating Committee on Investment shall prepare guidelines for this purpose.

"juridical person" means any legal entity duly constituted or otherwise organised under applicable law of a Member State, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association.

"measures" means laws, regulations, rules, procedures, decisions, administrative actions, or any other actions affecting investments taken by Member States.

"national" means a natural person having the citizenship of a Member State in accordance with its applicable laws.

## ARTICLE 2

### Coverage

This Agreement shall cover all direct investments other than -

- (a) portfolio investments; and
- (b) matters relating to investments covered by other ASEAN Agreements, such as the ASEAN Framework Agreement on Services.

## ARTICLE 3

### Objectives

The objectives of this Agreement are:

- (a) to establish a competitive ASEAN Investment Area with a more liberal and transparent investment environment amongst Member States in order to -
  - (i) substantially increase the flow of investments into ASEAN from both ASEAN and non-ASEAN sources;
  - (ii) jointly promote ASEAN as the most attractive investment area;
  - (iii) strengthen and increase the competitiveness of ASEAN's economic sectors;
  - (iv) progressively reduce or eliminate investment regulations and conditions which may impede investment flows and the operation of investment projects in ASEAN; and
- (b) to ensure that the realisation of the above objectives would contribute towards free flow of investments by 2020.

## ARTICLE 4

### Features

The AIA shall be an area where:

- (a) there is a co-ordinated ASEAN investment co-operation programme that will generate increased investments from ASEAN and non-ASEAN sources;
- (b) national treatment is extended to ASEAN investors by 2010, and to all investors by 2020, subject to the exceptions provided for under this Agreement;
- (c) all industries are opened for investment to ASEAN investors by 2010 and to all investors by 2020, subject to the exceptions provided for under this Agreement;
- (d) the business sector has a larger role in the co-operation efforts in relation to investments and related activities in ASEAN; and
- (e) there is freer flow of capital, skilled labour and professionals, and technology amongst Member States.

## ARTICLE 5

### General Obligations

To realise the objectives referred to in Article 3, the Member States shall:

- (a) ensure that measures and programmes are undertaken on a fair and mutually beneficial basis;
- (b) undertake appropriate measures to ensure transparency and consistency in the application and interpretation of their investment laws, regulations and administrative procedures in order to create and maintain a predictable investment regime in ASEAN;
- (c) begin the process of facilitation, promotion and liberalisation which would contribute continuously and significantly to achieving the objective of a more liberal and transparent investment environment;

- (d) take appropriate measures to enhance the attractiveness of the investment environment of Member States for direct investment flows; and
- (e) take such reasonable actions as may be available to them to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within their territories.

## ARTICLE 6

### **Programmes and Action Plans**

1. Member States shall, for the implementation of the obligations under this Agreement, undertake the joint development and implementation of the following programmes:
  - (a) co-operation and facilitation programme as specified in Schedule I;
  - (b) promotion and awareness programme as specified in Schedule II; and
  - (c) liberalisation programme as specified in Schedule III.
2. Member States shall submit Action Plans for the implementation of the programmes in paragraph 1 to the AIA Council established under Article 16 of this Agreement.
3. The Action Plans shall be reviewed every 2 years to ensure that the objectives of this Agreement are achieved.

## ARTICLE 7

### **Opening Up of Industries and National Treatment**

1. Subject to the provisions of this Article, each Member State shall:
  - (a) open immediately all its industries for investments by ASEAN investors;

- (b) accord immediately to ASEAN investors and their investments, in respect of all industries and measures affecting investment including but not limited to the admission, establishment, acquisition, expansion, management, operation and disposition of investments, treatment no less favourable than that it accords to its own like investors and investments ("national treatment").
2. Each Member State shall submit a Temporary Exclusion List and a Sensitive List, if any, within 6 months after the date of signing of this Agreement, of any industries or measures affecting investments (referred to in paragraph 1 above) with regard to which it is unable to open up or to accord national treatment to ASEAN investors. These lists shall form an annex to this Agreement. In the event that a Member State, for justifiable reasons, is unable to provide any list within the stipulated period, it may seek an extension from the AIA Council.
  3. The Temporary Exclusion List shall be reviewed every 2 years and shall be progressively phased out by 2010 by all Member States except the Socialist Republic of Vietnam, the Lao People's Democratic Republic and the Union of Myanmar. The Socialist Republic of Vietnam shall progressively phase out the Temporary Exclusion List by 2013 and the Lao People's Democratic Republic and the Union of Myanmar shall progressively phase out their Temporary Exclusion Lists by 2015.
  4. The Sensitive List shall be reviewed by 1 January 2003 and at such subsequent periodic intervals as may be decided by the AIA Council.

## ARTICLE 8

### Most Favoured Nation Treatment

1. Subject to Articles 7 and 9 of this Agreement, each Member State shall accord immediately and unconditionally to investors and investments of another Member State, treatment no less favourable than that it accords to investors and investments of any other Member State with respect to all measures affecting investment including but not limited to the admission, establishment, acquisition, expansion, management, operation and disposition of investments.
2. In relation to investments falling within the scope of this Agreement, any preferential treatment granted under any existing or future agreements or arrangements to which a Member State is a party shall be extended on the most favoured nation basis to all other Member States.

3. The requirement in paragraph 2 shall not apply to existing agreements or arrangements notified by Member States to the AIA Council within 6 months after the date of signing of this Agreement.
4. Nothing in paragraph 1 shall prevent any Member State from conferring special treatment or advantages to adjacent countries under growth triangles and other sub- regional arrangements between Member States.

## ARTICLE 9

### Waiver of Most Favoured Nation Treatment

1. Where a Member State is temporarily not ready to make concessions under Articles 7 of this Agreement, and another Member State has made concessions under the said Article, then the first mentioned Member State shall waive its rights to such concessions. However, if a Member State which grants such concessions is willing to forego the waiver, then the first mentioned Member State can still enjoy these concessions.
2. Having regard to the late entry into ASEAN of the Socialist Republic of Vietnam, the Lao People's Democratic Republic and the Union of Myanmar, the provisions of paragraph 1 of this Article shall only apply to the Socialist Republic of Vietnam for a period of 3 years, and the Lao People's Democratic Republic and the Union of Myanmar for a period of 5 years from the date this Agreement comes into force.

## ARTICLE 10

### Modification of Schedules, Annexes and Action Plans

1. Any modification to Schedules I and II, and Action Plans thereof shall be subject to the approval of the Co-ordinating Committee on Investments (CCI) established under Article 16(4) of this Agreement.
2. Any modification to or withdrawal of any commitments in Schedule III and Action Plans thereof and the Annexes shall be subject to the consideration of the AIA Council in accordance with the provisions of the ASEAN Protocol on Notification Procedures.

## ARTICLE 11

### Transparency

1. Each Member State shall make available to the AIA Council through publication or any other means, all relevant measures, laws, regulations and administrative guidelines which pertain to, or affect, the operation of this Agreement. This shall also apply to international agreements pertaining to or affecting investment to which a Member State is also a signatory.
2. Each Member State shall promptly and at least annually inform the AIA Council of the introduction of any new or any changes to existing laws, regulations or administrative guidelines which significantly affect investments or its commitments under this Agreement.
3. Nothing in this Agreement shall require any Member State to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

## ARTICLE 12

### Other Agreements

1. Member States affirm their existing rights and obligations under the 1987 ASEAN Agreement for the Promotion and Protection of Investments and its 1996 Protocol. In the event that this Agreement provides for better or enhanced provisions over the said Agreement and its Protocol, then such provisions of this Agreement shall prevail.
2. This Agreement or any action taken under it shall not affect the rights and obligations of the Member States under existing agreements to which they are parties.
3. Nothing in this Agreement shall affect the rights of the Member States to enter into other agreements not contrary to the principles, objectives and terms of this Agreement.

## ARTICLE 13

### General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on investment flows, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures;

- (a) necessary to protect national security and public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
  - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on investment agreement.
  - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts.
  - (iii) safety.
- (d) aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investments or investors of Member States.

## ARTICLE 14

### Emergency Safeguard Measures

1. If, as a result of the implementation of the liberalisation programme under this Agreement, a Member state suffers or is threatened with any serious injury and threat, the Member State may take emergency safeguard measures to the extent and for such period as may be necessary to prevent or to remedy such injury. The measures taken shall be provisional and without discrimination.
2. Where emergency safeguard measures are taken pursuant to this Article, notice of such measure shall be given to the AIA Council within 14 days from the date such measures are taken.

3. The AIA Council shall determine the definition of serious injury and threat of serious injury and the procedures of instituting emergency safeguards measures pursuant to this Article.

## ARTICLE 15

### Measures to Safeguard the Balance of Payments

1. In the event of serious balance of payments and external financial difficulties or threat thereof, a Member State may adopt or maintain restrictions on investments on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognised that particular pressures on the balance of payments of a Member State in the process of economic development or economic transition may necessitate the use of restrictions to ensure, inter alia, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.
2. Where measures to safeguard balance of payments are taken pursuant to this Article notice of such measures shall be given to the AIA Council within 14 days from the date such measures are taken.
3. The measures referred to in paragraph (1):
  - (a) shall not discriminate among Member States;
  - (b) shall be consistent with the Articles of Agreement of the International Monetary Fund;
  - (c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member State;
  - (d) shall not exceed those necessary to deal with the circumstances described in paragraph 1; and
  - (e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves.
4. The Member States adopting the balance of payments measures shall commence consultations with the AIA Council and other Member States within 90 days from the date of notification in order to review the balance of payment measures adopted by it.
5. The AIA Council shall determine the rules applicable to the procedures under this Article.

## ARTICLE 16

### **Institutional Arrangements**

1. The ASEAN Economic Ministers (AEM) shall establish an ASEAN Investment Area Council (in this Agreement referred to as "the AIA Council") comprising the Ministers responsible for investment and the Secretary-General of ASEAN. The ASEAN Heads of Investment Agencies shall participate in the AIA Council meetings.
2. Notwithstanding Article 21 of this Agreement, the AIA Council shall be established upon the signing of this Agreement.
3. The AIA Council shall supervise, co-ordinate and review the implementation of this Agreement and assist the AEM in all matters relating thereto.
4. In the performance of its functions, the AIA Council shall establish a Co-ordinating Committee on Investment (CCI) comprising senior officials responsible for investment and other senior officials from relevant government agencies.
5. The Co-ordinating Committee on Investment shall report to the AIA Council through the Senior Economic Officials Meeting (SEOM).
6. The ASEAN Secretariat shall be the secretariat to the AIA Council and the Co-ordinating Committee on Investment (CCI).

## ARTICLE 17

### **Settlement of Disputes**

1. The Protocol on Dispute Settlement Mechanism for ASEAN shall apply in relation to any dispute arising from, or any differences between Member States concerning the interpretation or application of this Agreement or any arrangement arising therefrom.
2. If necessary, a specific dispute settlement mechanism may be established for the purpose of this Agreement which shall form an integral part of this Agreement.

## **ARTICLE 18**

### **Amendments**

Any amendments to this Agreement shall be made by consensus and shall become effective upon the deposit of instruments of ratification or acceptance by all signatory governments with the Secretary-General of ASEAN.

## **ARTICLE 19**

### **Supplementary Agreements or Arrangements**

The Schedules, Action Plans, Annexes, and any other arrangements or agreements arising under this Agreement shall form an integral part of this Agreement.

## **ARTICLE 20**

### **Accession of New Members**

New members of ASEAN shall accede to this Agreement on terms and conditions agreed between them and signatories to this Agreement and by depositing the instrument of accession with the Secretary-General of ASEAN.

## **ARTICLE 21**

### **Final Provisions**

1. This Agreement shall enter into force upon the deposit of instruments of ratification or acceptance by all signatory governments with the Secretary-General of ASEAN. The signatory governments undertake to deposit their instruments of ratification or acceptance within 6 months after the date of signing of this Agreement.
2. This Agreement shall be deposited with the Secretary-General of ASEAN, who shall promptly furnish a certified copy thereof to each Member State.

**IN WITNESS WHEREOF**, the undersigned being duly authorised by their respective Governments, have signed this Framework Agreement on the ASEAN Investment Area.

**DONE at Makati, Philippines this 7<sup>th</sup> day of October 1998**, in a single copy in the English language.

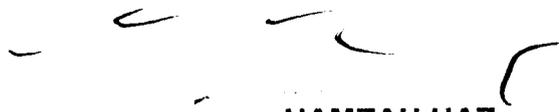
For the Government of Brunei Darussalam



**ABDUL RAHMAN TAIB**

Minister of Industry and Primary Resources

For the Government of the Republic of Indonesia



**HAMZAH HAZ**

Minister of Investment/Chairman of Investment Coordinating Board

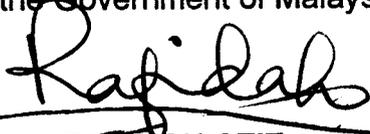
For the Government of the Lao People's Democratic Republic



**SOULIVONG DARAVONG**

Minister of Industry and Handicrafts

For the Government of Malaysia



**RAFIDAH AZIZ**

Minister of International Trade and Industry

For the Government of the Union of Myanmar



**BRIGADIER GENERAL DAVID O. ABEL**

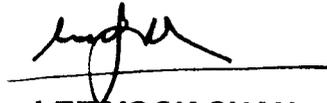
Minister at the Office of the Chairman of the State Peace and Development Council

For the Government of the Republic of the Philippines



**JOSE TRINIDAD PARDO**  
Secretary of Trade and Industry

For the Government of the Republic of Singapore



**LEE YOCK SUAN**  
Minister for Trade and Industry

For the Government of the Kingdom of Thailand



**SUPACHAI PANITCHPAKDI**  
Deputy Prime Minister and Minister of Commerce

For the Government of the Socialist Republic of Vietnam



**TRUONG DINH TUYEN**  
Minister of Trade

## **SCHEDULE I**

### **FRAMEWORK AGREEMENT ON THE ASEAN INVESTMENT AREA (AIA)**

#### **CO-OPERATION AND FACILITATION PROGRAMME**

In respect of the Co-operation and Facilitation Programme, Member States shall take-

- (a) Individual initiative to-
  - (i) Increase transparency of Member State's investment rules, regulations, policies and procedures through the publication of such information on a regular basis and making such information widely available;
  - (ii) Simplify and expedite procedures for applications and approvals of investment projects at all levels; and
  - (iii) Expand the number of bilateral Double Taxation Avoidance Agreements among ASEAN Member States.
- (b) Collective initiative to-
  - (i) Establish a Database for ASEAN Supporting Industries and ASEAN Technology Suppliers;
  - (ii) Establish an ASEAN database to enhance the flow of ASEAN investment data and information on investment opportunities in ASEAN;
  - (iii) Promote public-private sector linkages through regular dialogues with the ASEAN business community and other international organisations to identify investment impediments within and outside ASEAN and propose ways to improve the ASEAN investment environment;
  - (iv) Identify target areas for technical co-operation, e.g., development of human resources, infrastructure, supporting industries, small and medium-sized enterprises, information technology, industrial technology, R & D and co-ordinate efforts within ASEAN and other international organisations involved in technical co-operation;
  - (v) Review and where possible improve the ASEAN Agreement for the Promotion and Protection of Investment, and
  - (vi) Examine the possibility of an ASEAN Double Taxation Agreement.

## **SCHEDULE II**

### **FRAMEWORK AGREEMENT ON THE ASEAN INVESTMENT AREA (AIA)**

#### **PROMOTION AND AWARENESS PROGRAMME**

In respect of the Promotion and Awareness Programme, Member States shall-

1. Organise joint investment promotion activities e.g., seminars, workshops, in-bound familiarisation tours for investors from capital exporting countries, joint promotion of specific projects with active business sector participation.
2. Conduct regular consultation among investment agencies of ASEAN on investment promotion matters;
3. Organise investment-related training programmes for officials of investment agencies of ASEAN;
4. Exchange lists of promoted sectors/industries where Member States could encourage investments from other Member States and initiate promotional activities; and
5. Examine possible ways by which the investment agencies of Member States can support the promotion efforts of other Member States.

### **SCHEDULE III**

#### **FRAMEWORK AGREEMENT ON THE ASEAN INVESTMENT AREA (AIA)**

##### **LIBERALISATION PROGRAMME**

In respect of the Liberalisation Programme, Member States shall-

1. Unilaterally reduce and eliminate restrictive investment measures and review their investment regimes regularly towards further liberalisation. In this context, Member States may undertake actions to liberalise, among others:
  - (i) rules, regulations and policies relating to investment;
  - (ii) rules on licensing conditions;
  - (iii) rules relating to access to domestic finance; and
  - (iv) rules to facilitate payment, receipts and repatriation of profits by investors.
  
2. Undertake individual action plans to:
  - (i) open up all industries for investment to ASEAN investors by 2010 and to all investors by 2020 in accordance with the provisions of this Agreement; and
  - (ii) extend national treatment to all ASEAN investors by 2010 and to all investors by 2020 in accordance with the provisions of this Agreement; and
  
3. Promote freer flow of capital, skilled labour, professionals and technology among ASEAN Member States.



**PROTOCOL TO AMEND  
THE FRAMEWORK AGREEMENT  
ON THE ASEAN INVESTMENT AREA**

The Governments of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand, the Socialist Republic of Vietnam, Member States of the Association of South-East Asian Nations ("ASEAN");

**RECALLING** the Framework Agreement on the ASEAN Investment Area ("AIA Agreement") signed on 7 October 1998 at Makati, Philippines, which aims to establish a competitive and dynamic ASEAN Investment Area through a more liberal and transparent investment environment that would contribute towards the free flow of investments;

**NOTING WITH SATISFACTION** that the ASEAN Investment Area now extends across all ten Southeast Asian countries with the accession of the Kingdom of Cambodia to the AIA Agreement on 30 April 1999;

**DESIRING** to expedite the implementation of the AIA Agreement pursuant to the agreement of the ASEAN Leaders in paragraph 8 of the Statement on Bold Measures adopted at the Sixth ASEAN Summit on 16 December 1998 in Hanoi, Vietnam, and to widen and elaborate its coverage as agreed by the First AIA Council Meeting on 5 March 1999 in Phuket, Thailand;

**NOTING** that Article 18 of the AIA Agreement provides for amendments to it;

**HAVE AGREED AS FOLLOWS:**

## **ARTICLE 1**

Article 2 of the AIA Agreement shall be substituted with the following:

- “1. This Agreement shall cover all direct investments other than:
  - (a) portfolio investments; and
  - (b) matters relating to investment covered by other ASEAN Agreements.
  
2. Without prejudice to the provisions of paragraph 1, this Agreement shall also include direct investments in the following sectors and services incidental to such sectors:
  - (a) manufacturing;
  - (b) agriculture;
  - (c) fishery;
  - (d) forestry;
  - (e) mining and quarrying.
  
3. This Agreement shall further cover direct investments in such other sectors and services incidental to such sectors as may be agreed upon by all Member States.”

## **ARTICLE 2**

Article 7 of the AIA Agreement shall be amended as follows:

- a) by including the sentence below as a new paragraph 4:

“Notwithstanding the provisions of paragraph 3, the Temporary Exclusion List for the manufacturing sector shall be progressively phased out by all Member States by 2003 except the Kingdom of

Cambodia, the Lao People's Democratic Republic and the Socialist Republic of Vietnam which shall do so not later than 2010.”

- b) by renumbering the existing paragraph 4 as paragraph 5.

### **ARTICLE 3**

Article 8 of the AIA Agreement shall be amended as follows:

- a) by including the sentence below as a new paragraph 4:

“Member States shall notify the AIA Council of the future investment related agreements or arrangements which grant preferential treatment which they enter into, as and when any such agreements are concluded and come into force.”

- b) by renumbering the existing paragraph 4 as paragraph 5.

### **ARTICLE 4**

Paragraph 2 of Article 9 of the AIA Agreement shall be substituted with the following:

“Having regard to the late entry into ASEAN of the Socialist Republic of Vietnam, the Lao People's Democratic Republic, the Union of Myanmar and the Kingdom of Cambodia, the provisions of paragraph 1 of this Article shall only apply to:

- (a) the Socialist Republic of Vietnam after a period of 3 years;
- (b) the Kingdom of Cambodia, the Lao People's Democratic Republic and the Union of Myanmar after a period of 5 years;

from the date this Agreement comes into force.”

## ARTICLE 5

1. This Protocol shall enter into force upon the deposit of instruments of ratification or acceptance by all signatory Governments with the Secretary-General of ASEAN which shall be done within six months after the date of signing of this Protocol.
2. This Protocol shall be deposited with the Secretary-General of ASEAN, who shall promptly furnish a certified copy thereof to each Member State.

**IN WITNESS WHEREOF**, the undersigned being duly authorised by their respective Governments, have signed this Protocol to Amend the Framework Agreement on the ASEAN Investment Area.

**Done at Ha Noi, Viet Nam this fourteenth day of September 2001, in a single copy in the English Language.**

For the Government of Brunei Darussalam



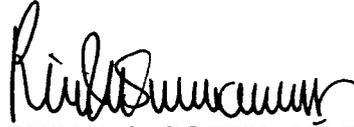
**ABDUL RAHMAN TAIB**  
Minister of Industry and Primary Resources

For the Government of the Kingdom of Cambodia



**KONG VIBOL**  
Secretary of State of Economy and Finance  
Vice-Chairman of the Council for the Development of Cambodia

For the Government of the Republic of Indonesia



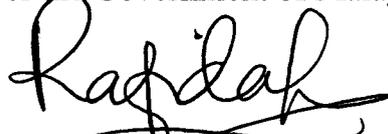
**RINI M. S. SOEWANDI**  
Minister of Trade and Industry

For the Government of the Lao People's Democratic Republic



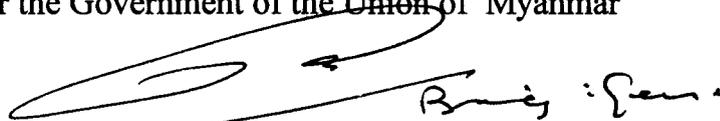
**SOULIVONG DARAVONG**  
Minister of Industry and Handicraft

For the Government of Malaysia



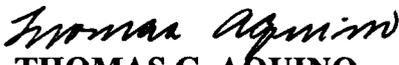
**RAFIDAH AZIZ**  
Minister of International Trade and Industry

For the Government of the Union of Myanmar

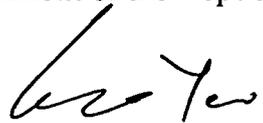


**BRIGADIER GENERAL DAVID O. ABEL**  
Minister at the Office of the Chairman of the State Peace  
and Development Council

For the Government of the Republic of the Philippines

  
**THOMAS G. AQUINO**  
Undersecretary of Trade and Industry

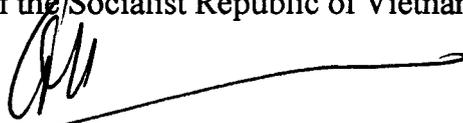
For the Government of the Republic of Singapore

  
**GEORGE YONG-BOON YEO**  
Minister for Trade and Industry

For the Government of the Kingdom of Thailand

  
**ADISAI BODHARAMIK**  
Minister of Commerce

For the Government of the Socialist Republic of Vietnam

  
**TRAN XUAN GIA**  
Minister of Planning and Investment



## **ASEAN PROTOCOL ON ENHANCED DISPUTE SETTLEMENT MECHANISM**

The Governments of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam, Member States of the Association of South East Asian Nations (hereinafter collectively referred to as "ASEAN" or "Member States" or singularly as "Member State");

**RECALLING** the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Singapore on 28 January 1992, as amended by the Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Bangkok on 15 December 1995 (the "Agreement") and the Protocol on Dispute Settlement Mechanism signed in Manila on 20 November 1996 ( the "1996 Protocol on DSM");

**FURTHER RECALLING** that the 9th ASEAN Summit held in Bali on 7-8 October 2003, had decided on institutional strengthening of ASEAN, including the improvement of the ASEAN Dispute Settlement Mechanism, as reflected in the Bali Concord II;

**DESIRING** to replace the 1996 Protocol on DSM with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (hereinafter referred to as "Protocol");

**HAVE AGREED AS FOLLOWS:**

### **ARTICLE 1 Coverage and Application**

1. The rules and procedures of this Protocol shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the Agreement as well as the agreements listed in Appendix I and future ASEAN economic agreements (the "covered agreements").
2. The rules and procedures of this Protocol shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements. To the extent that there is a difference between the rules and procedures of this Protocol and the special or additional rules and procedures in the covered agreements, the special or additional rules and procedures shall prevail.

3. The provisions of this Protocol are without prejudice to the rights of Member States to seek recourse to other fora for the settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other fora at any stage before a party has made a request to the Senior Economic Officials Meeting ("SEOM") to establish a panel pursuant to paragraph 1 Article 5 of this Protocol.

## **ARTICLE 2**

### **Administration**

1. The SEOM shall administer this Protocol and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the SEOM shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of findings and recommendations of panel and Appellate Body reports adopted by the SEOM and authorise suspension of concessions and other obligations under the covered agreements.
2. The SEOM and other relevant ASEAN bodies shall be notified of mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements.

## **ARTICLE 3**

### **Consultations**

1. Member States shall accord adequate opportunity for consultations regarding any representations made by other Member States with respect to any matter affecting the implementation, interpretation or application of the Agreement or any covered agreement. Any differences shall, as far as possible, be settled amicably between the Member States.
2. Member States which consider that any benefit accruing to them directly or indirectly, under the Agreement or any covered agreement is being nullified or impaired, or that the attainment of any objective of the Agreement or any covered agreement is being impeded as a result of failure of another Member State to carry out its obligations under the Agreement or any covered agreement, or the existence of any other situation may, with a view to achieving satisfactory settlement of the matter, make representations or proposals to the other Member State concerned, which shall give due consideration to the representations or proposals made to it.

3. All such requests for consultations shall be notified to the SEOM. Any request for consultations shall be submitted in writing and shall give the reason for the request including identification of the measures at issue and an indication of the legal basis for the complaint.
4. If a request for consultations is made, the Member State to which the request is made shall reply to the request within ten (10) days after the date of its receipt and shall enter into consultations within a period of thirty (30) days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.
5. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

#### **ARTICLE 4**

##### **Good Offices, Conciliation or Mediation**

1. Member States which are parties to a dispute may at any time agree to good offices, conciliation or mediation. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request to the SEOM for the establishment of a panel.
2. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.
3. The Secretary-General of ASEAN may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Member States to settle a dispute.

#### **ARTICLE 5**

##### **Establishment of Panels**

1. If the Member State to which the request for consultations is made does not reply within ten (10) days after the date of receipt of the request, or does not enter into consultations within a period of thirty (30) days after the date of receipt of the request, or the consultations fail to settle a dispute within sixty (60) days after the date of receipt of the request, the matter shall be raised to the SEOM if the complaining party wishes to request for a panel. The panel shall be established by the SEOM, unless the SEOM decides by consensus not to establish a panel.
2. A panel shall be established at the meeting of the SEOM held immediately after the receipt of the request for a panel and accordingly the request shall be placed on the agenda of the SEOM at that meeting.

In the event that no the SEOM meeting is scheduled or planned within forty five (45) days of receipt of the request, the establishment of the panel or the decision not to establish it shall be done or taken, as the case may be, by circulation. A non-reply shall be considered as agreement to the request for the establishment of a panel. The issue of the establishment of the panel shall be settled within the forty five (45) day-period, irrespective of whether it is settled at the SEOM or by circulation.

3. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the complainant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of the special terms of reference.

## **ARTICLE 6**

### **Terms of Reference of Panels**

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise prior to the establishment of a panel:  
  
"To examine in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the SEOM by (name of party) in (document) ... and to make such findings as will assist the SEOM in the adoption of the panel report or in making its decision not to adopt the report."
2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.
3. In establishing a panel, the SEOM may authorise its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, notwithstanding the provisions in paragraph 1 hereof. The terms of reference thus drawn up shall be circulated to all Member States. If other than standard terms of reference are agreed upon, any Member State may raise any point relating thereto with the SEOM at the time of establishment of a panel.

## **ARTICLE 7**

### **Function of Panel**

The function of the panel is to make an objective assessment of the dispute before it, (including an examination of the facts of the case and the applicability

of and conformity with the sections of the Agreement or any covered agreements) and its findings and recommendations in relation to the case.

## **ARTICLE 8**

### **Panel Procedures, Deliberations and Findings**

1. A panel shall, apart from the matters covered in Appendix II regulate its own procedures in relation to the rights of parties to be heard and its deliberations.
2. A panel shall submit its findings and recommendations to the SEOM in the form of a written report within sixty (60) days of its establishment. In exceptional cases, the panel may take an additional ten (10) days to submit its findings and recommendations to the SEOM.
3. Before submitting its findings and recommendations to the SEOM, the panel shall accord adequate opportunity to the parties to the dispute to review the report.
4. A panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. A Member State shall respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.
5. Panel deliberations shall be confidential. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

## **ARTICLE 9**

### **Treatment of Panel Report**

1. The SEOM shall adopt the panel report within thirty (30) days of its submission by the panel unless a party to the dispute formally notifies the SEOM of its decision to appeal or the SEOM decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the SEOM until after the completion of the appeal. SEOM representatives from Member States which are parties to a dispute can be present during the deliberations of the SEOM.
2. In the event that no meeting of the SEOM is scheduled or planned to enable adoption or non-adoption of the panel report, as the case may be, within the thirty (30) day period in paragraph 1 hereof, the adoption shall be done by circulation. A non-reply shall be considered as acceptance of the decision and/or recommendation in the panel report. The adoption or non-adoption shall be completed within the thirty (30) day

period in paragraph 1 hereof, notwithstanding the resort to a circulation process.

**ARTICLE 10**  
**Procedures for Multiple Complainants**

1. Where more than one Member State requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Member States concerned. A single panel should be established to examine such complaints whenever feasible.
2. The single panel shall organize its examination and present its findings and recommendations to the SEOM in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.
3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible, the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

**ARTICLE 11**  
**Third Parties**

1. The interests of the parties to a dispute and those of other Member States under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.
2. Any Member State having a substantial interest in a matter before a panel and having notified its interest to the SEOM (referred to in this Protocol as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.
3. Third parties shall receive the submissions of the parties to the dispute to the first substantive meeting of the panel.
4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member State may have recourse to normal dispute settlement

procedures under this Protocol. Such a dispute shall be referred to the original panel wherever possible.

## **ARTICLE 12 Appellate Review**

1. An Appellate Body shall be established by the ASEAN Economic Ministers ("AEM"). The Appellate Body shall hear appeals from panel cases. It shall be composed of seven (7) persons, three (3) of whom shall serve on any one case. Persons serving on the Appellate Body shall serve on cases in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.
2. The AEM shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.
3. The Appellate Body shall comprise of persons of recognised authority, irrespective of nationality, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of ASEAN. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.
4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties, which have notified the SEOM of a substantial interest in the matter pursuant to paragraph 2 of Article 11 may make written submissions to, and be given an opportunity to be heard by the Appellate Body.
5. As a general rule, the proceedings of the Appellate Body shall not exceed sixty (60) days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 5 of Article 3. When the Appellate Body considers that it cannot provide its report within sixty (60) days, it shall inform the SEOM in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed ninety (90) days.
6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

7. The Appellate Body shall be provided with the appropriate administrative and legal support as it requires.
8. Working procedures of the Appellate Body shall be drawn up by the SEOM. Any amendments thereto, shall be drawn up from time to time as necessary by the Appellate Body in consultation with the SEOM and the Secretary-General of ASEAN, and communicated to the Member States for their information.
9. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.
10. Opinions expressed in the Appellate Body report by the individuals serving on the Appellate Body shall be anonymous.
11. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 hereof during the appellate proceeding.
12. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.
13. An Appellate Body report shall be adopted by the SEOM and unconditionally accepted by the parties to the dispute unless the SEOM decides by consensus not to adopt the Appellate Body report within thirty (30) days following its circulation to the Member States. In the event that no meeting of the SEOM is scheduled or planned to enable adoption or non-adoption of the report, as the case may be, within the thirty (30) day period, adoption shall be done by circulation. A non-reply within the said thirty (30) day period shall be considered as an acceptance of the Appellate Body report. This adoption procedure is without prejudice to the rights of Member States to express their views on an Appellate Body report. The adoption process shall be completed within the thirty (30) day period irrespective of whether it is settled at the SEOM or by circulation.

### **ARTICLE 13**

#### **Communications with the Panel or Appellate Body**

1. There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or the Appellate Body.
2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but it shall be made available to the parties to the dispute. Nothing in this Protocol shall preclude a party to a dispute from

disclosing statement of its own positions to the public. Member States shall treat as confidential information submitted by another Member State to the panel or the Appellate Body which that Member State has designated as confidential. A party to a dispute shall also, upon request of a Member State, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

#### **ARTICLE 14**

##### **Panel and Appellate Body Recommendations**

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member State concerned bring the measure into conformity with that agreement. In addition to its recommendations, a panel or the Appellate Body may suggest ways in which the Member State concerned could implement the recommendations.
2. In their findings and recommendations, a panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.
3. The panels and the Appellate Body shall also deal with the issue of expenses to be borne by the parties to the dispute, including third parties, to replenish the ASEAN Dispute Settlement Mechanism ("DSM") Fund as part of their findings and recommendations. The panels and the Appellate Body may apportion the expenses in the manner appropriate to the particular case.

#### **ARTICLE 15**

##### **Surveillance of Implementation of Findings and Recommendations**

1. Since prompt compliance with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM is essential in order to ensure effective resolution of disputes, parties to the dispute who are required to do so shall comply with the findings and recommendations of panel reports adopted by the SEOM within sixty (60) days from the SEOM's adoption of the same, or in the event of an appeal sixty (60) days from the SEOM's adoption of the findings and recommendations of the Appellate Body reports, unless the parties to the dispute agree on a longer time period.
2. When a party to the dispute requests for a longer time period for compliance, the other party shall take into account the circumstances of the particular case and accord favourable consideration to the complexity of the actions required to comply with the findings and

recommendations of panel and Appellate Body reports adopted by the SEOM. The request for a longer period of time shall not be unreasonably denied. Where it is necessary to pass national legislation to comply with the findings and recommendations of panel and Appellate Body reports, a longer period appropriate for that purpose shall be allowed.

3. The decision of the parties on the extension of time shall be made within fourteen (14) days from the SEOM's adoption of the findings and recommendations of the panel report, or in the event of an appeal fourteen (14) days from the SEOM's adoption of the findings and recommendations of the Appellate Body's reports.
4. Any party required to comply with the findings and recommendations shall provide the SEOM with a status report in writing of their progress in the implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM.
5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within sixty (60) days, after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the SEOM in writing of the reasons for the delay together with an indication of the period within which it will submit its report. In no case shall the proceedings for this purpose and the submission of the report exceed ninety (90) days after the date of reference of the matter to the panel.
6. The SEOM shall keep under surveillance the implementation of the findings and recommendations of panel and Appellate Body reports adopted by it. The issue of implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM may be raised at the SEOM by any Member State at any time following their adoption. Unless the SEOM decides otherwise, the issue of implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM shall be placed on the agenda of the SEOM meeting and shall remain on the SEOM's agenda until the issue is resolved. At least ten (10) days prior to each such the SEOM meeting, the party concerned shall provide the SEOM with a status report in writing of its progress in the implementation of the findings and recommendations of panel and Appellate Body reports adopted by the SEOM.

**ARTICLE 16**  
**Compensation and the Suspension of Concessions**

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the findings and recommendations of panel and Appellate Body reports adopted by the SEOM are not implemented within the period of sixty (60) days or the longer time period as agreed upon by the parties to the dispute as referred to in Article 15. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.
2. If the Member State concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the findings and recommendations of panel and Appellate Body reports adopted by the SEOM within the period of sixty (60) days or the longer time period as agreed upon by the parties to the dispute as referred to in Article 15, such Member State shall, if so requested, and no later than the expiry of the period of sixty (60) days or the longer time period referred to in Article 15, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within twenty (20) days after the date of expiry of the period of sixty (60) days or the longer time period as agreed upon by the parties to the dispute as referred to in Article 15, any party having invoked the dispute settlement procedures may request authorization from the SEOM to suspend the application to the Member State concerned of concessions or other obligations under the covered agreements.
3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:
  - (a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;
  - (b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sector(s) under the same agreement;
  - (c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sector(s) under the same agreement, and that the circumstances

are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

- (d) in applying the above principles, that party shall take into account:
  - (i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;
  - (ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;
- (e) for purposes of this paragraph, "sector" means:
  - (i) with respect to goods, all goods;
  - (ii) with respect to services, a principal sector as identified in the current schedules of commitments under the ASEAN Framework Agreement on Services (AFAS).
- (f) for purposes of this paragraph, "agreement" means:
  - (i) with respect to goods, the agreements in relation to goods listed in Appendix I to this Protocol;
  - (ii) with respect to services, the ASEAN Framework Agreement of Services and subsequent protocols;
  - (iii) any other covered agreement as defined in Article 1 of this Protocol.

- 4 The level of the suspension of concessions or other obligations authorized by the SEOM shall be equivalent to the level of the nullification or impairment.
5. The SEOM shall not authorise suspension of concessions or other obligations if a covered agreement prohibits such suspension.
6. When the situation described in paragraph 2 hereof occurs, the SEOM, upon request, shall grant authorization to suspend concessions or other obligations within thirty (30) days of the expiry of the sixty (60) day-period or the expiry of the longer period agreed upon by the parties to the dispute, as the case may be, referred to in Article 15, unless the SEOM decides by consensus to reject the request. In the event that no meeting of the SEOM is scheduled or planned to enable authorisation to suspend concessions or other obligations within the thirty (30) day

period, the authorisation shall be done by circulation. A non-reply within the said thirty (30) day period shall be considered as an acceptance of the authorisation. The authorisation process shall be completed within the thirty (30) day period irrespective of whether it is settled at the SEOM or by circulation.

7. However, if the Member State concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorisation to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitration appointed by the Secretary-General of ASEAN and shall be completed within sixty (60) days after the date of expiry of the sixty (60) day period or the expiry of the longer period agreed upon by the parties to the dispute, as the case may be, referred to in Article 15. Concessions or other obligations shall not be suspended during the course of the arbitration.
8. The arbitrator acting pursuant to paragraph 7 hereof shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 hereof have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3 hereof. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The SEOM shall be informed promptly of the decision of the arbitrator and shall, upon request, grant authorisation to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the SEOM decides by consensus to reject the request.
9. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member State that must implement recommendations and findings of the panel and Appellate Body reports adopted by the SEOM provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 15, the SEOM shall continue to keep under surveillance the implementation of adopted recommendations and findings of the panel and Appellate Body reports adopted by the SEOM, including those cases where compensation has been provided or concessions or other

obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

10. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member State. When the SEOM has ruled that a provision of a covered agreement has not been observed, the responsible Member State shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Protocol relating to compensation and suspension of concessions or other obligations shall apply in cases where it has not been possible to secure such observance.

#### **ARTICLE 17 ASEAN DSM Fund**

1. There shall be established an ASEAN DSM Fund (hereinafter referred to as 'the Fund') for the purposes of this Protocol. The Fund shall be a revolving fund, separate from ASEAN Secretariat's regular budget. The initial sum for the Fund shall be contributed equally by all the Member States. Any drawdown from the Fund shall be replenished by the parties to the dispute in line with the provision of paragraph 3 of Article 14. The ASEAN Secretariat shall be responsible for administering the Fund.
2. The Fund shall be used to meet the expenses of the panels, the Appellate Body and any related administration costs of the ASEAN Secretariat. All other expenses, including legal representation, incurred by any party to a dispute shall be borne by that party.
3. The subsistence allowances and other expenses of the panels and the Appellate Body shall be in accordance with the criteria approved by the AEM on the recommendations of the ASEAN Budget Committee.

#### **ARTICLE 18 Maximum Time-Frame**

The total period for the disposal of disputes under this Protocol until the stage contemplated under paragraph 7 of Article 16, shall not exceed 445 days, unless the longer time period under Article 15 applies.

**ARTICLE 19**  
**Responsibilities of the Secretariat**

1. The ASEAN Secretariat shall have the responsibility of assisting the panels and the Appellate Body, especially on the legal, historical and the procedural aspects of the matters dealt with, and of providing secretarial and technical support.
2. The ASEAN Secretariat shall assist the SEOM to monitor and maintain surveillance of the implementation of the findings and recommendations of the panel and Appellate Body reports adopted by it.
3. The ASEAN Secretariat shall be the focal point to receive all documentations in relation to disputes and shall deal with them as appropriate.
4. The ASEAN Secretariat in consultation with the SEOM shall administratively update the list of covered agreements in Appendix I, as may be required from time to time. The Secretariat shall inform Member States as and when the changes have been made.

**ARTICLE 20**  
**Venue for Proceedings**

1. The venue for proceedings of the panels and the Appellate Body shall be the ASEAN Secretariat.
2. Notwithstanding the provisions of paragraph 1 above, panel and Appellate Body proceedings, apart from substantive meetings, may be held at any venue which the panels and the Appellate Body consider appropriate in consultation with the parties to the dispute, having regard to the convenience and cost effectiveness of such venue.

**ARTICLE 21**  
**Final Provisions**

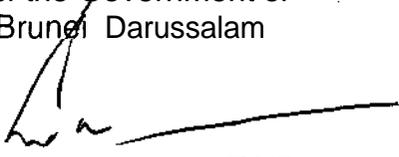
1. This Protocol shall enter into force upon signing.
2. This Protocol shall replace the 1996 Protocol on DSM and shall not apply to any dispute which has arisen before its entry into force. Such dispute shall continue to be governed by the 1996 Protocol on DSM.
3. The provisions of this Protocol may be modified through amendments mutually agreed upon in writing by all Member States.

4. This Protocol shall be deposited with the Secretary-General of ASEAN, who shall promptly furnish a certified copy thereof, to each ASEAN Member State.

**IN WITNESS WHEREOF**, the undersigned, being duly authorised thereto by their respective Governments, have signed the ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

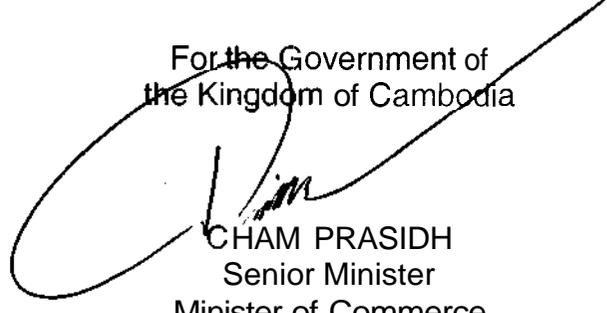
**DONE** at Vientiane, Lao PDR on 29 November 2004, in a single copy in the English language.

For the Government of  
Brunei Darussalam



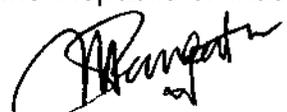
ABDUL RAHMAN TAIB  
Minister of Industry and  
Primary Resources

For the Government of  
the Kingdom of Cambodia



CHAM PRASIDH  
Senior Minister  
Minister of Commerce

For the Government of  
the Republic of Indonesia



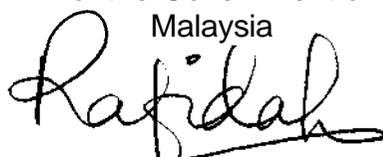
MARI ELKA PANGESTU  
Minister of Trade

For the Government of  
the Lao People's Democratic Republic



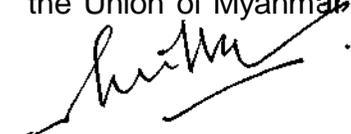
SOULIVONG DARAVONG  
Minister of Commerce

For the Government of  
Malaysia



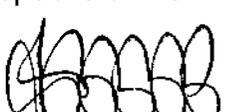
RAFIDAH AZIZ  
Minister of International Trade  
and Industry

For the Government of  
the Union of Myanmar



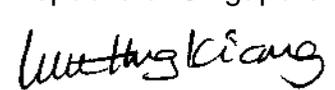
SOE THA  
Minister of National Planning and  
Economic Development

For the Government of  
the Republic of the Philippines



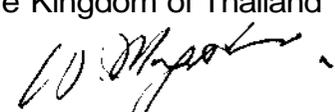
CESAR V. PURISIMA  
Secretary of Trade and Industry

For the Government of  
the Republic of Singapore



LIM HNG KIANG  
Minister for Trade and Industry

For the Government of  
the Kingdom of Thailand



WATANA MUANGSOOK  
Minister of Commerce

For the Government of  
the Socialist Republic of Vietnam



TRUONG DINH TUYEN  
Minister of Trade

## **APPENDIX I COVERED AGREEMENTS**

1. Agreement on ASEAN Preferential Trading Arrangements, Manila, 24 February 1977.
2. Agreement on the ASEAN Food Security Reserve, New York, 4 October 1979.
3. Basic Agreement on ASEAN Industrial Projects, Kuala Lumpur, 6 March 1980.
4. Supplementary Agreement of the Basic Agreement on ASEAN Industrial Projects ASEAN Urea Project (Indonesia), Kuala Lumpur, 6 March 1980.
5. Basic Agreement on ASEAN Industrial Joint Ventures, Jakarta, 7 November 1983.
6. Agreement on ASEAN Energy Cooperation, Manila, 24 June 1986.
7. ASEAN Petroleum Security Agreement, Manila, 24 June 1986.
8. Agreement on the Preferential Shortlisting of ASEAN Contractors, Jakarta, 20 October 1986.
9. Supplementary Agreement to the Basic Agreement on ASEAN Industrial Joint Ventures, Singapore, 16 June 1987.
10. Protocol on Improvements on Extensions of Tariff Preferences under the ASEAN Preferential Trading Arrangement, Manila, 15 December 1987.
11. Revised Basic Agreement on ASEAN Industrial Joint Ventures, Manila, 15 December 1987.
12. Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, Manila, 15 December 1987.
13. Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, 1 January 1991.
14. Framework Agreement on Enhancing ASEAN Economic Cooperation, Singapore, 28 January 1992.

15. Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, Singapore, 28 January 1992.
16. Second Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, Manila, 23 October 1992.
17. Third Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, 2 March 1995.
18. Protocol to Amend the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), Bangkok, 15 December 1995.
19. Protocol to Amend the Agreement on ASEAN Preferential Trading Arrangements, Bangkok, 15 December 1995.
20. ASEAN Framework Agreement on Services, Bangkok, 15 December 1995.
21. ASEAN Framework Agreement on Intellectual Property Cooperation, Bangkok, 15 December 1995.
22. Protocol Amending the Agreement on ASEAN Energy Cooperation, Bangkok, 15 December 1995.
23. Basic Agreement on ASEAN Industrial Cooperation, Singapore, 26 April 1996.
24. Protocol to Amend the Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, Jakarta, 12 September 1996.
25. ASEAN Agreement on Customs, Phuket, Thailand, 1 March 1997
26. Protocol Amending the Agreement on the ASEAN Energy Cooperation, Kuala Lumpur, Malaysia, 23 July 1997
27. 2nd Protocol to Amend the Agreement on the ASEAN Food Security Reserve, Subang Jaya, Malaysia, 23 July 1997
28. Protocol to Implement the Initial Package of Commitments Under the ASEAN Framework Agreement on Services, Kuala Lumpur, Malaysia, 15 December 1997
29. Agreement on the Establishment of the ASEAN Center for Energy, Manila, Philippines, 22 May 1998

30. Protocol on Notification Procedures, Makati, Philippines, 7 October 1998
31. Framework Agreement on the ASEAN Investment Area, Makati, Philippines, 7 October 1998
32. ASEAN Framework Agreement on Mutual Recognition Arrangement (MRAs), Ha Noi, Viet Nam, 16 December 1998
33. Protocol to Implement the Second Package of Commitments Under the ASEAN Framework Agreement on Services, Ha Noi, Viet Nam, 16 December 1998
34. ASEAN Framework Agreement on the Facilitation of Goods in Transit, Ha Noi, Viet Nam, 16 December 1998
35. Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products, Singapore, 30 September 1999
36. Protocol regarding the Implementation of the CEPT Scheme Temporary Exclusion List, Singapore, 23 November 2000
37. E-ASEAN Framework Agreement, Singapore, 24 November 2000
38. Protocol 5: ASEAN Scheme of Compulsory Motor Vehicle Insurance, Kuala Lumpur, Malaysia, 8 April 2001
39. Protocol to Amend the Framework Agreement on the ASEAN Investment Area, Ha Noi, Viet Nam 14 September 2001
40. Protocol to Implement the Third Package of Commitments Under the ASEAN Framework Agreement Services, Ha Noi, Viet Nam, 31 December 2001
41. ASEAN Sectoral Mutual Recognition Arrangement for Electrical and Electronic Equipment, Bangkok, Thailand, 5 April 2002
42. Protocol to Implement the Second Package of Commitments on Financial Services Under the ASEAN Framework Agreements on Services, Yangon, Myanmar, 6 April 2002
43. Protocol to Amend the Agreement the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA) for the Elimination of Import Duties, 31 January 2003
44. Protocol Governing the Implementation of the ASEAN Harmonized Tariff Nomenclature, Makati, Philippines, 7 August 2003

45. Agreement on the ASEAN Harmonized Cosmetic Regulatory Scheme, Phnom Penh, Cambodia, 2 September 2003
46. Protocol to Amend the Protocol Governing the Implementation of the ASEAN Harmonised Tariff Nomenclature, Jeju Island, Korea, 15 May 2004

## APPENDIX II WORKING PROCEDURES OF THE PANEL

### I. Composition of Panels

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member State. In the nomination to the panels, preference shall be given to individuals who are nationals of ASEAN Member States.
2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.
3. Nationals of Member States whose governments are parties to the dispute shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.
4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the SEOM. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.
5. Panels shall be composed of three panelists unless the parties to the dispute agree, within ten (10) days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.
6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.
7. If there is no agreement on the panelists, within twenty (20) days of the decision of the SEOM to establish a panel, at the request of either party, the Secretary-General of ASEAN, in consultation with the SEOM shall, within ten (10) days determine the composition of the panel by appointing the panelists whom the Secretary-General of ASEAN considers most appropriate, and if so relevant, in accordance with any relevant special or additional rules or

procedures of the covered agreed or covered agreements which are at issue in the dispute, after consulting the parties in the dispute. The ASEAN Secretariat shall inform the Member States of the composition of the panel thus formed.

8. Member States shall undertake, as a general rule, to permit their officials to serve as panelists.

9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Member States shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

## **II. Panel Proceedings**

1. In its proceedings the panel shall follow the relevant provisions of this Protocol. In addition, the following working procedures shall apply.

2. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.

3. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in this Protocol shall preclude a party to a dispute from disclosing statements of its own positions to the public. Member States shall treat as confidential information submitted by another Member State to the panel which that Member State has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member State, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.

5. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.

6. All third parties which have notified their interest in the dispute to the SEOM shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.

7. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to

be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.

8. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

9. The parties to the dispute and any third party invited to present its views in accordance with Article 11 shall make available to the panel a written version of their oral statements.

10. The parties to the dispute shall make available to the panel a written version of their oral statements.

11. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 8 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.

12. Any additional procedures specific to the panel.

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