Lancaster University

Lawan Thanadsillapakul
LL.B. (Hons), (T.U.), LL.M. (T.U.), LL.M. (V.U.B.)

A New Direction for ASEAN Regionalisation in the Changing Global Legal and Economic Environment

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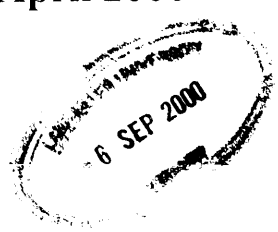

Dedicated to my late beloved mother

ขออุทิศแด่ดวงวิญญาณของคุณแม่สุดที่รัก

Abstract

LAWAN THANADSILLAPAKUL, LL.B. (HONS), (T.U.), LL.M. (T.U.), LL.M, (V.U.B.).

"A New Direction for ASEAN Regionalisation in the Changing Global Legal and Economic Environment", thesis presented for the degree of Ph.D., Department of Law, Lancaster University, October 1999.

ASEAN is an economic group comprised of the countries of Southeast Asia. ASEAN and Asia Pacific has been the most dynamic and fastest growing region in the world. But the 1997 Asian crisis sent the 'Asian Tigers' into turmoil. The rise and fall of Asia clearly reflects the interdependence of East Asian countries and the world economy, and also reflects the impact of the changing global legal and economic environment on these countries. ASEAN countries have gone through a volatile period and thus have embarked on deeper integration to strengthen regional economic self-reliance while committing to an open market orientation. A new direction for ASEAN, "Open Regionalism", will balance regional integration and global liberalisation.

Economists who are specialists in the Asian region have overwhelmingly applauded "Open Regionalism", while lawyers have remained ambivalent and suspicious about how it works in balancing preferential regional agreements with generalised global liberalisation. ASEAN is going to test the feasability of implementing "Open Regionalism" in reality. Regionally, ASEAN has launched new integration schemes to liberalise trade, investment and services using a hybrid model of liberalisation based on MFN and NT treatment with negative lists, but subject to stand still and roll back principles. Preferences granted to ASEAN members would be enjoyed by non-ASEAN enterprises through the concept of "ASEAN Investor" and "ASEAN Service Provider" under AIA and AFAS, through the "ASEAN Rules of Origin" under AFTA, and through the AICO scheme, as well as through "Short-Term Measures" adopted in 1998. ASEAN has kept margins of preference as low as it can to encourage inflows of trade and investment into the region. Nationally, ASEAN

countries are reinforcing their openness by unilaterally liberalising their trade and investment regimes, complying with WTO regulations. By all these means, ASEAN can both strengthen regional integration and encourage outsiders to invest in ASEAN due to economies of scale.

ASEAN has adopted concerted unilateral liberalisation and negative integration, but the strengthening of its legal and institutional framework through regulatory networks and layered governance will be fundamental to its success. This thesis considers whether ASEAN can resolve the dichotomies between regionalism and global liberalisation and successfully achieve a balance between the two, which would further propel global economic development and narrow the gap between North and South.

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Lawan Thanadsillapakul
Lancaster University
Lancaster, United Kingdom
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List of Acronyms

AAF	ASEAN Automotive Federation
ABC	ASEAN Brussels Committee
ACCRRIS	ASEAN Co-ordinating Committee for the Reconstruction and Rehabilitation of Indochina States
ACPHP	ASEAN Crop Post-Harvest Program
AEM	ASEAN Economic Ministers
AFAS	ASEAN Framework Agreement on Trade in Services
AFTA	ASEAN Free Trade Area
AIA	ASEAN Investment Area
AIC	ASEAN Industrial Complementation Schemes
AIJV	ASEAN Industrial Joint Venture Scheme
AIP	ASEAN Industrial Project
AIT	Asian Institute of Technology
AJDC	ASEAN-Japan Development Corporation
ALA	ASEAN Law Association
AMM	ASEAN Ministerial Meeting
APEC	Asia-Pacific Economic Co-operation
APEID	Asia and the Pacific Programme of Educational Innovation for Development
APO	Asian Productivity Organisation
ASA	Association of Southeast Asia
ASAIHL	Association of Southeast Asian Institutes of Higher Learning
ASEAN	Association of Southeast Asian Nations
ASEAN-CCI	ASEAN Chambers of Commerce and Industry
ASEAN PMC	ASEAN Post-Ministerial Conferences
ASID	ASEAN Supporting Industrial Database
ASPAC	Asian and Pacific Council
AWGIPC	ASEAN Working Group on Intellectual Property Co-operation
BAAIC	Basic Agreement on ASEAN Industrial Complementation
BAAIJV	Basic Agreement on ASEAN Industrial Joint Venture
BBC	Brand to Brand Complementation
BISD	Basic Instruments and Selected Documents
BIT	Bilateral Investment Treaty
BOI	Board of Investment
BTRCP	Bureau of Trade regulation and Consumer Protection
CCI	Co-ordinating Committee on Investment
CEPT	Common Effective Preferential Tariff
CMO	Comprehensive Multidisciplinary Outline
COCI	Committee on Culture and Information
COFAB	Committee on Finance and Banking

COFAF	Committee on Food, Agriculture and Forestry
COIME	Committee on Industry, Minerals and Energy
COSD	Committee on Social Development
COST	Committee on Science and Technology
COTAC	Committee on Transport and Communications
COTT	Committee on Trade and Tourism
CTI	Committee on Trade and Investment
EAEC	East Asian Economic Caucus
EC	European Community
ECAFE	Economic Commission for Asia and the Far East
EC-IIP	EC International Investment Partners
EDB	Economic Development Board
EEA	European Economic Area
EEC	European Economic Community
EIB	European Investment Board
EPZA	Export Processing Zone Authority
ERT	European Round Table
EU	European Union
FAO	Food and Agriculture Organisation
FCN	Friendship, Commerce and navigation
FDI	Foreign Direct Investment
FIC	Foreign Investment Committee
FOB	Free on Board
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GSP	Generalised System of Preferences
HLWP	High Level Working Party
IBRD	International Bank for Reconstruction and Development (World Bank)
ICSID	International Convention for the Settlement of Investment Disputes
IGA	Investment Guarantee Agreement
IMF	International Monetary Fund
INTERACT	European Community Public Development Finance Corporation
IP	Intellectual Property
IPC	Integrated Program for Commodities
IPP	Investment Priorities Plan
IPR	Intellectual Property Rights
MAI	Multilateral Agreement on Investment
MAPHILINDO	Malaysia, Philippines, Indonesia
MFA	Multi-Fibres Arrangement

MFN	Most Favoured Nation
MIDA	Malaysian Industrial Development Authority
MIGA	Multilateral Investment Guarantee Agency
MITI	Ministry of International Trade and Industry
MLR	Minimum Lending Rate
MR	Mutual Recognition
MRA	Mutual Recognition Agreement
NAFTA	North American Free Trade Area
NDP	National Development Policy
NEP	New Economic Policy
NGO	Non-Governmental Organisation
NIE	Newly Industrialised Economies
NT	National Treatment
NTB	Non-tariff Barriers
OAM	Other ASEAN Ministers
OECD	Organisation for Economic Co-operation and Development
PBEC	Pacific Business Economic Council
PECC	Pacific Economic Co-operation Conference
PTA	Preferential Trading Arrangement
ROC	Registrar of Companies
SCCAN	Special Co-ordinating Committee of ASEAN Nations
SEATO	Southeast Asia Treaty Organisation
SEC	Securities and Exchange Commission
SEOM	Senior Economic Officials Meeting
SL	Sensitive List
SMI	Small and Medium-Scale Industries
SOM	Senior Officials Meeting
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TDB	Trade Development Board
TEL	Temporary Exclusion List
TEM	Trade Experts Meeting
TNC	Transnational Corporation
TRIMs	Agreement on Trade Related Investment Measures
TRIPs	Agreement on Trade Related Intellectual Property Rights
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
UNDP	United Nations Development Programme

US	United States
VERs	Voluntary Export Restraints
WTO	World Trade Organisation
ZOPFAN	Zone of Peace, Freedom and Neutrality

Introduction

Over the past three decades, the success of East Asian economies in achieving rapid and equitable growth has raised complex questions about the relationship between government, business firms and the market, and the interaction between laws, institutions and economic policy in East Asian countries.

No single theory could explain the extraordinary growth of this region. Rather, successful outcomes had been achieved under a spectrum of policies and circumstances. A combination of multi-factors suitable for each economy and the favourable external environment during that period (1960s-1990s) were all ingredients of East Asian economies' success. Government intervention, economic policies, and the laws harmoniously played an important role in the process of industrialisation in the East Asian countries and they enabled these countries to take off in international business.

But the implications of the global environment are changing: while both neutral and interventionist outward-oriented strategies worked well during the early stage of the East Asian miracle, it is doubtful whether they can still be effective, as some are now prohibited under WTO regulations and some require revision. East Asian countries are increasingly pressured to follow not only trading rules negotiated under WTO but also a range of other rules covering investment, intellectual property, and many other matters.

Today international competition increasingly favours transnational corporations with networks of complementary production subsidiaries. The surge of internalisation of production through TNC networks, and of internationally integrated production, has dramatically changed the pattern of trade and investment, especially the shift of investment to the service sector and the more sophisticated high-

technology industries. This also emphasises the need of ASEAN countries to adapt their economic policy to cope with this change.

It is therefore essential for ASEAN and the Asia-Pacific to consider how to sustain economic growth in the region when the global economy has changed. Not only has the pattern of trade and investment changed considerably but also the global legal and economic environment has not remained as it was in the past decades, which were favourable to the success of the East and Southeast Asia.

ASEAN has gone through sharp swings of the rise and fall of Asia, and has realised that to sustain economic growth in today's world needs law and policy changes. Most important, ASEAN seeks a new direction for economic integration aiming at strengthening regional economic self-reliance, and cushioning any negative impact from global changes that might occur. ASEAN has recently launched new framework agreements for intra-regional liberalisation aiming at a higher level of economic integration. Meanwhile ASEAN is still committed to outward-looking policies and to strengthening its external economic relations. Under these circumstances, ASEAN can only resort to an "Open Regionalism" that would facilitate ASEAN regional integration while maintaining its strong economic ties with outsiders, in a way that will further enhance the region's integration with the world.

Objectives of the Thesis

This thesis endeavours to analyse the new direction of ASEAN in implementing regional integration based on the approach of "Open Regionalism". The main thrust of this ideology is to balance regionalism and global liberalisation. ASEAN countries have mostly espoused an open market orientation, as they have heavily depended on trade and investment that has flowed into the region. Therefore, while they move towards deeper regional integration for strengthening regional economic self-reliance, they still require to maintain their external economic ties, and they desire to encourage

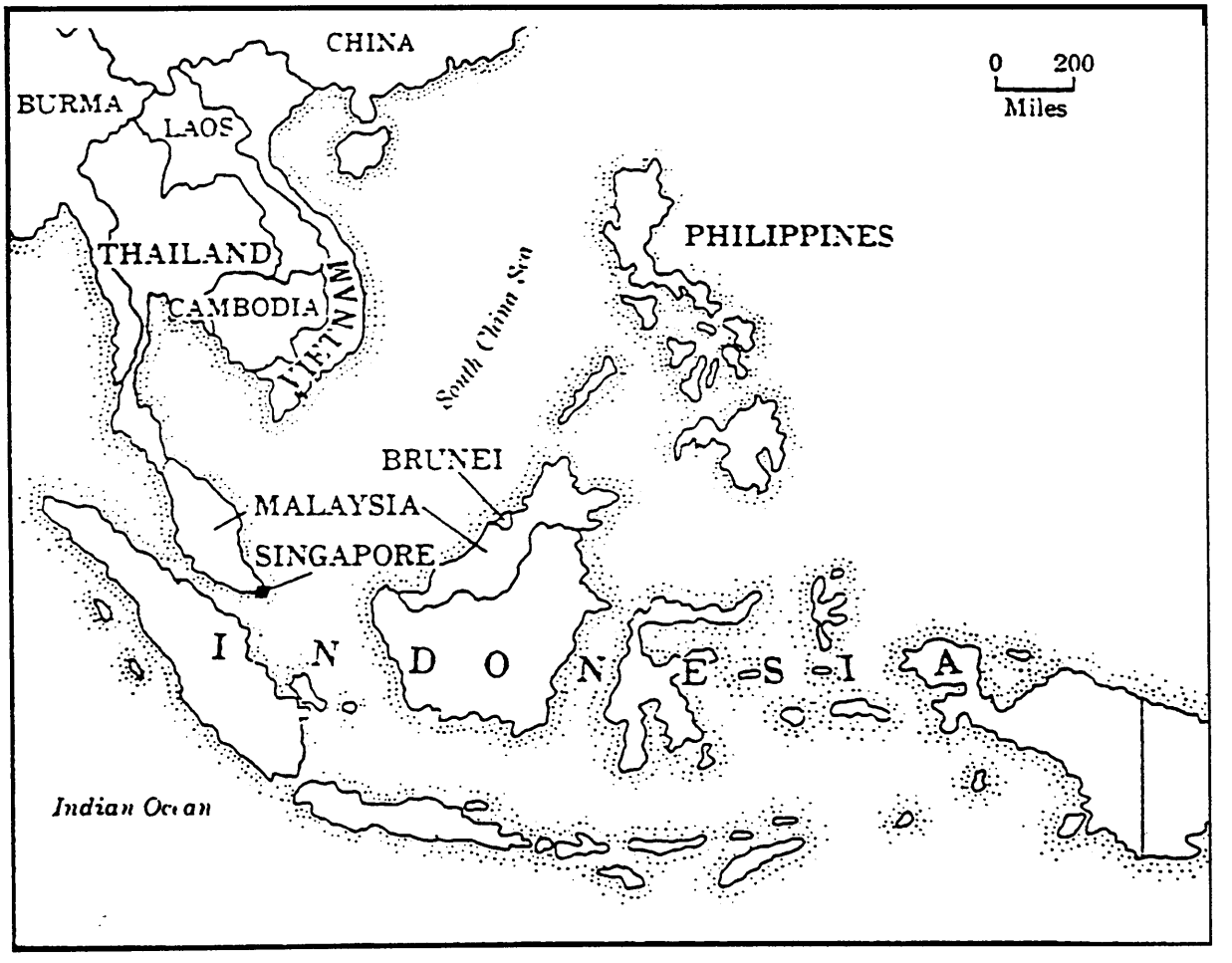
external trade and investment into the region to continue and even increase through regionalisation. ASEAN countries are committed to a "concerted unilateral liberalisation" rather than binding themselves under a regional supranational legal system, facilitated by centralised supranational institutions. This raises the question whether ASEAN will be successful in achieving its goal through "Open Regionalism" and by which means? How to balance regional integration that involves preferential treatment among member countries with the generalised liberalisation that requires non-discriminate liberalisation? This thesis thus seeks to analyse whether ASEAN will successfully achieve its objectives through its present means, and how to reach its goals in the long term.

The Outline of the Thesis

The thesis will firstly explore the historical, political and economic background of ASEAN and its member countries, ASEAN in the regional and global context and its economic interaction within and outside the region. I move on to analyse the impact of the changing global legal and economic environment on ASEAN countries, and then the rationale behind ASEAN's embarkation on regional integration based on the approach of "Open Regionalism". This overall view of ASEAN will lead to the focus on investment, the main engine propelling economic growth of the region, by analysing ASEAN countries' investment regimes, laws, regulations and investment agreements concluded by individual countries, and at regional level. The analysis of this chapter will indicate a trend of ASEAN countries' investment liberalisation and a feasibility to achieve the goal of regional integration. This is followed by an analysis of the legal aspects of the new ASEAN framework agreements that centre on the liberalisation of trade, investment and services by establishing an ASEAN Free Trade Area and ASEAN Investment Area encompassing service trade, going beyond the liberalisation under the GATS. The new schemes include co-operation on Intellectual

Properties facilitating the enforcement of IP laws. This chapter will explain how regionalism may be balanced with generalised liberalisation, how regional preferential treatment may be balanced with global liberalisation, and how ASEAN can implement regional integration while reinforcing its open market orientation. This is followed by a chapter focusing on competition laws and policy. Since ASEAN embarks on regional liberalisation and deregulation of trade and investment, this involves issues of fair competition between firms doing business within the region, and the establishment of regional competition laws and policy is very crucial to monitor enterprises' business practices to ensure maximum advantages from regional liberalisation. I conclude with an analysis of ASEAN's institutions and mechanisms, and the necessity of developing an effective legal and institutional infrastructure based on an appropriate framework in order to successfully achieve its ultimate goal of "Open Regionalism".

Map of South East Asia
Showing ASEAN Countries



Chapter 1

ASEAN and the Asia-Pacific Region

Introduction

ASEAN countries[1], members of the Association of Southeast Asian Nations and other East Asian economies have been regarded as the highest economic growth area of the world (Bergsten & Noland, 1993; World Bank, 1993a) and thus were named 'the Asian Tigers'. Despite the 1997 Asian financial crisis that caused economic turmoil in the region, the Asia-Pacific region including ASEAN countries still constitute a very attractive market for trade and investment[2]. Economists have predicted that after recovering from the crisis these dynamic economies will grow even faster than before, provided that they adjust their economic policies, laws and regulations as well as develop their infrastructure in the right direction[3].

There are several factors influencing the economic growth of East Asia and the combination of legal and economic environments that affect the rise and fall of Asia. ASEAN countries are located in the economically dynamic and fastest growing region

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[1] The original five founding members of ASEAN, Indonesia, Malaysia, the Philippines, Singapore, and Thailand, had achieved impressive economic growth during the period of the Asian economic boom. Now members of ASEAN have increased to 10 countries composing of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. The new members still have modest economic performance and thus are not included in the term "high economic performance economies", in fact, they all became members of ASEAN after the Asian crisis, except Vietnam which joined ASEAN in 1995.

[2] See UNCTAD (1998a, chapter VII), also see UNCTAD and ICC (1998). The report emphasised that FDI flows have remained closed to pre-crisis levels, and are expected to remain high in the long term. Also see Asia Pulse Pte Ltd (1999). It reported that out of the US$760 billion FDI inflows to developing countries between 1993-1998, 87% of the total investment to LDCs went to Asia and some Latin American countries. And accounting 80 % share of the total FDIs to developing Asia were made in ASEAN and China, the two dominant recipients of FDI flows. FDI flows were concentrated in six ASEAN countries, accounting for 98 percent of the US$132.5 billion in FDI flows to the region in the same period.

[3] See Statement of the ASEAN General-Secretary "The Impact of the Economic Crisis on Asia: a blessing in disguise?" Keynote address by H. E. Rodolfo C. Severino, Secretary-General of ASEAN at the opening of the Seventh ASEAN Conference, Antara, Jakarta, Indonesia, 12 April 1999.

of the Asia-Pacific[4] and they have gone through episodes of economic development affected by the global and regional economic environment. Recently, ASEAN has entered into innovative free trade arrangements encompassing investment and service trade liberalisation, in a new direction for regionalism balancing regionalisation and globalisation. This may be adopted as a future model of economic integration that is consistent with WTO principles. The factors affecting the rise and fall of Asia have significant implications for ASEAN's development of this new direction, especially it reflects the impacts of the global economy on the ASEAN's legal and institutional adjustment, as well as the direction of its economic integration that based on ASEAN's outward orientation. This chapter will examine how the global and regional economic environment affects ASEAN and how the interaction between the two helps shape ASEAN economic development.

1.1 The Rise and Fall of Asia

1.1.1 The Asian Miracle and the Main Factors of Economic Growth in the Asia-Pacific Region from 1960s-1997

The expansion of the Japanese economy since the 1960s, the emergence of the newly industrialised economies (NIEs) ten years later, the rise of another group of new NIEs in Southeast Asia (ASEAN) since the 1980s and the more recent emergence of China have prompted economists to assess the causes of the success of these economies. The economic growth of this region has been sustained for decades (World Bank, 1993a) even when the growth of world economy was slow[5], and if this high growth rate continued the World Bank speculated that East Asia would be the core of

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[4] See Cardenas, Lorraine and Buranakanis, Arpaporn (1999) Vol 5. P. 52.

[5]. The global economy witnessed a substantial slowdown in growth in the early 1990s. East Asia was the only region that was able to maintain very high growth rates during that period with an average growth rate of 7-8% as well as to maintain low inflation rate down to below 5% (World Bank, 1993a).

world economic growth[6], heralding the emergence of the 'Pacific Century' (Forbes, 1995: 24).

The success story of East Asia has raised complex questions about the relationship between government, the private sector, and the market, how they can efficiently and effectively work, what factors make East Asian economies differ from other developing countries. The explanations of this phenomenon had been diverse, based on the different theories adopted. Neo-classical approaches (Krueger, 1993: 17-19; Balassa, 1997) had emphasised outward orientation and macroeconomic discipline; Structuralist theories (Amsden, 1989; Pack and Westphal, 1986: 88-128; World Bank, 1991) had pointed out the government leadership in industrial policy and promulgating favourable laws and regulations to foreign investment; and finally, Culturalist explanations had centred on the governance and societal characteristics, as shaped by the region's Confucian traditions (Petri, 1993a). Confucian tradition stresses self-improvement, emphasises education and facilitative bureaucratic control. In addition to these theories, an explanation based on the so-called "contagion of regional success" resulting from the 'Flying Geese' economic pattern spearheaded by Japan has been broadly recognised as a cause of the East Asian miracle (Primo Braga and Bannister, 1994: 97-136) which is due to the economic proximity, intra-regional integration in East Asia and the strategic location of the countries in this region.

In this region, governmental intervention had had an important influence on the process of industrialisation, evolving from an import substitution to an export-oriented policy and moving towards an open or market orientation. Major development agencies, including the World Bank, were forced to rethink many

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[6] See World Bank (1993a), and COM (94) 314 final, Commission of the European Union (EEC).

previously unexamined assumptions that stand behind the economic policy-making of these economies[7].

In fact, there was nothing miraculous about the success of the East Asian economies. Rather, each country had deliberately established the essential conditions for growth, and the development strategies employed had been carefully matched to their institutional capacity and economic environment. Petri (Petri, 1993a: IX) has mentioned that:

> "The adaptation of policies to endowments was not usually the result of luck, but rather of search, experimentation and reform. Pragmatic, perseverent policy-making was facilitated in the region's successful countries by exceptional social and political stability".

In order to analyse the current and future economic trend of East Asian countries, I will discuss economic development in this region, focusing on the main factors in the economic growth of East Asian economies.

1.1.2 Economic Development in the Asia-Pacific Region

The East Asian economies have been characterised as dynamic economies, based on their fast development in industrialisation and high success in export. International trade and investments have been the foundation of East Asia's impressive economic growth as they have been the engines of development in the region. Thus the reason for the strong economic performance of East Asia has been the sharp increase in trade and investment resulting from industrialisation and the export push policy, and later, the open market-oriented policy implemented by the countries in the region. Over the past quarter century, East Asia's exports rose more than thirty fold to about US$ 850 billion, raising East Asia's share of world exports from about

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[7] See World Bank (1993a) and Petri (1993a) for detailed analysis of the "Asian Miracle" and its strategic policy implemented.

7% to 21%, the import trend had also been rising[8]. The World Bank estimated that during the rest of this decade, East Asia was likely to account for at least a third of the increment in total world imports as indicated in Table 1 (World Bank, 1994b; IMF. Direction of Trade Statistic various issues).

Table 1
Increase in Imports 1992-2000
(US$ billion)

	1992	2000	Increase	% of total increase
East Asia	792	1,443	651	33
European Union	1,525	1,997	472	24
United States	553	922	369	19
Rest of the World	973	1,448	475	24

Source: World Bank 1993, World Bank staff estimates

Regarding investment, East Asian countries have been the largest developing FDI recipients, accounting for 65% of the total investment flows to developing countries[9]. East Asian economies have been attracting increasing amounts of FDI because of sound macroeconomic policies and an open investment climate.

So trade and investment have been the main engines of economic growth in East Asia[10]. There have also been many factors reinforcing the performances of each economy in the region. Now I will briefly discuss these factors, which have encouraged the success of the East Asian countries.

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[8] See World Bank (1994b), also see Petri (1993a), and Forbes (1995).
[9] UNCTAD Overview (1999b: 17), especially only the top five developing host countries (China and ASEAN countries) receive 55 % of inflow foreign investment in developing world.
[10] Iqbal, B. A. (1986: 236). He further pointed out that trade and development are the two sides of the same coin. Trade brings development and development in turn boosts trade, which truly applied in the case of ASEAN.

1.1.3 The Main Factors of Economic Progress in the Asia-Pacific

1.1.3.1 The 'Flying Geese' Pattern of Trade and Investment

A key factor in the success of the industrialisation process of the East Asian countries has been the 'Flying Geese' pattern[11] of trade and investment led by the Japanese TNCs. According to this pattern, the dispersion of technology is transmitted through FDI from the lead country to the follower countries (Akamatsu, 1960; Braga and Bannister, 1994). In the case of East Asia, Japan is regarded as the lead country followed by the early NIEs, which in turn have been followed by the new NIEs: Indonesia, Malaysia, The Philippines, and Thailand. Japanese TNCs combined their technological advantage with the lower factor costs in follower countries, to move production of 'second-tier' products offshore[12]. Then the combination of foreign capital and cheaper production costs made the follower country's products more competitive in world markets. Moreover, FDI provided the experiences, management skills and know-how needed to connect the East Asian economies to the world market (World Bank, 1994a), especially the large markets of North America and the integrated European Union, which helped to absorb new products. This resulted in the increase of East Asia's exports.

This 'Flying Geese' pattern reflected economic adaptations to changing factor endowments, and countries are helped by following and copying the successful policies and technologies of neighbouring countries, which Petri called "the contagion of economic success" (Petri, 1992). Close ties through trade, culture, and history have

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[11] See Primo Braga and Bannister, (1994) and Petri (1993a) for detailed analysis of the "Flying Geese Pattern".

[12] When Japan has reached the advanced economy its real wage increased and needed to re-allocate the basic manufacturing industries (second-tier production) to the more cheaper labour countries.

helped East Asian countries take advantage of each other's experience in production, marketing, management, and policy-making.

This sequential industrialisation pattern has evolved remarkably smoothly over the past 25 years. Japan, the NIEs, China and the more advanced Southeast Asian countries followed each other in a range of industries and markets without any sign of losing their momentum. By moving to a higher rung, each economy left the lower rungs of the ladder to less advanced economies. And countries all along the ladder have been able to upgrade their manufacturing relatively free of market constraints, as fast as their investments in technology and capital would permit. This trade and investment pattern also contributes to intra-regional trade. This is because TNCs locate operations in more than one East Asian country, and intra-firm transfers create regional trade. For example, the case of computer trading, intra-regional trade grows much faster than external trade accounting for 25% of NIEs' trade in computers (World Bank, 1994a: 53). In fact the industrialisation process of East Asian countries, especially developing East Asian countries, went along with various policies, ranging from an import substitution policy in the early stage of their development, to an export push policy in the middle stage, and then to a market-oriented policy. As the East Asian countries have been successful in industrialisation[13], they have upgraded their production methodology and technology, resulting in an increase of production output. Then East Asian countries were pushed to seek external markets to absorb new products, as their internal market was too small.

Obviously trade and investment policies have been very crucial to the development of the countries in this region. However, the policies implemented varied

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[13] For detailed analysis of the evolution of ASEAN industrialisation and the economic policy changes in ASEAN see Ariff, Mohamed & Hill, Hal (1985).

from country to country depending on their economic infrastructure and their level of economic development.

1.1.3.2 The Government Intervention Strategies, Institutions and Economic Policies of East Asian Countries

The key policies fundamentals used in East Asian economies are ensuring low inflation and competitive exchange rates, creating an effective and secure financial system, limiting price distortions, absorbing foreign technology, limiting the bias against agriculture and finally building human capital. These policies were implemented by various government intervention strategies.

In the early stage of East Asian countries' development process, the import substitution policy had aimed at promoting local industry with a strong bias against imports and at protecting domestic infant industry. But they moved to establish a pro-export regime more quickly than other developing economies. First Japan in the late 1950s and early 1960s, and then the four Tigers[14] in the 1970s, shifted trade policy to encourage manufactured exports, followed by the new NIEs, ASEAN countries in the 1980s. East Asian governments established a pro-export incentive structure that still coexisted with the variable protection of domestic markets and industries[15]. A wide variety of instruments were used, including export credits, duty-free imports for exporters and their suppliers, export targets, and tax incentives. This period saw the launching of investment incentive packages granted for both domestic and foreign investment.

Penetration into world markets was the priority policy of East Asian economies, since the success of industrialisation made productivity output grow very

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[14]. The four NIEs: Hong Kong, Taiwan, Korea, and Singapore.
[15]. For instance, local content requirements have been used in all East Asian countries: see chapter 4.

rapidly, so that the domestic market was too small to absorb new products, and also because they were compelled to acquire foreign exchange. Instead of stricter import controls, East Asian countries sought to earn more foreign exchange by increasing exports. Thus trade policies encouraging manufactured exports were the most crucial. Exchange rate policies were liberalised, and currencies frequently devalued in order to support export growth. Government intervention was also made through the direct fiscal costs of subsidies. All East Asian countries' sectoral policies were geared toward export performance, even programmes of selective industrial promotion were also export-promoting.

In order to direct economic growth toward its goals, governments promoted specific industries, and under some circumstances in specific areas, by granting incentives and subsidies to investors in the promoted industry[16]. Usually promoted industries were capital- and high technology- intensive. However, some specific indigenous local industries essential to domestic economy were also promoted in order to preserve cultural values and traditional industries in the country.

In the capital markets, East Asian governments controlled interest rates and directed credit, but acted within a framework of careful monitoring and generally low subsidies to borrowers. Most East Asian economies influenced credit allocation by enforcing regulations to improve private banks' project selection, by creating financial institutions, especially long-term credit development banks, and by directing credit to specific sectors and firms through public and private banks[17]. The implicit subsidy of directed-credit programmes in East Asian economies was generally small, but access

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[16]. For instance, Japan promoted heavy industry in the 1950s followed by Korea, the well-known "Conglomeration Project" in heavy industry. In other countries the advance, capital-and knowledge-intensive industries have been promoted (World Bank, 1993a).

to credit and the signal of government support to favoured sectors or enterprises were important.

In labour markets, governments focused their efforts on job generation, effectively boosting the demand for workers. As a result, employment levels have risen first, followed by market- and productivity-driven increases in wage levels[18].

The East Asian countries sought foreign technology through a variety of mechanisms ranging from licensing transfers, capital good imports, foreign training, and especially openness to foreign direct investment, which speeded technology acquisition. Manufactured export growth also provided a powerful mechanism for technological upgrading in imperfect world technology markets. Because firms that export have greater access to best-practice technology, there are both benefits to the enterprise and spillovers to the rest of the economy that are not reflected in market transactions. These information-related externalities are an important source of rapid productivity growth.

In addition to these policies and strategies, East Asian countries created institutions[19] to promote economic growth. The institutional mechanism facilitates close relations and co-ordination between the private sector and government by improving communication between them. Formal deliberation councils have been

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[17]. For example, in Thailand there is the Bank for Agriculture and Co-operatives, which grants loan for farmers and co-operative business in the villages with very low interest and with a long grace period. This helps the agriculture sector and helps poor people in the villages to be self-reliant.

[18]. Even in the agriculture sector, high productivity and income growth in agriculture helped to keep East Asian urban wages close to the supply price of labour. In the industrial sector government legislated a minimum wage, but this policy is subordinate to the policy of job generation (World Bank, 1993a: 32-36).

[19]. For example, in Thailand, the Board of Investment (BOI) effectively promotes, co-ordinates and facilitates investment of both domestic and foreign investors. In Japan, MITI is the main institution to facilitate and promote Japanese and foreign investment. In Malaysia, the Ministry of Trade and Investment is the one responsible for trade and investment issues, especially foreign investment.

established in many East Asian countries[20], which included government officials, journalists, labour representatives, and academics. Politically they helped establish a commitment to share growth and reduce rent-seeking. The World Bank report (World Bank, 1993a: 353) pointed out that:

> "Information sharing made it more difficult for firms to curry special favours from the government and for government officials to grant special concessions".

One important policy behind this mechanism is to create a business-friendly environment and reinforce the government-private sector co-operation. Legal and regulatory structures were also generally hospitable and transparent to private investment.

East Asian countries provided a stable macroeconomic environment and a reliable legal framework and institutions to promote domestic and international competition in each economy in the region. High investments in human capital, education and health were regarded as legitimate roles for government as well. Nevertheless, there is debate about whether government intervention was an essential factor in the success of the East Asian economies. However, the very fact was that almost if not all East Asian economies did use strategic policies and government intervention in their development process. Thus it does seem that the mixture of this factor with the other ingredients, earlier mentioned, harmoniously worked together, especially the adaptation of these countries' policies to the changing global economy, and the adoption of outward-oriented and market-driven policies in the latter stage of

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[20]. Japan, Korea, Malaysia and Singapore have established forums called "Deliberation Councils" in which private sector groups are invited to help shape and implement the government policies relevant to their interests. In contrast to lobbying where rules are murky and groups seek secret advantage over one another, the deliberation councils are intended to make allocation rules clear to all participants. In East Asian countries, the private sector participated in drafting the rules and the process was transparent to all participants so that private sector groups became more willing in the leadership's development efforts. This results in reducing the private resources devoted to wasteful rent-seeking activities and making more resources available for productive endeavours (World Bank, 1993a: 352-3).

their development. Thus, government intervention[21] did play an important role in the success of East Asian economies. However, this was not the only factor in the success story of East Asia, there have been other factors.

1.1.3.3 The Favourable External Economic and Legal Environment

An important factor in the success of East Asian economies was the favourable external economic and legal environment. In the period when these countries switched to export-push, the world market opened to the products exported from the region, while the global legal framework still tolerated a degree of government intervention (see evolution of part IV under GATT in section 1.2 below). They benefited also from the results of the Tokyo Round that legalised special treatment for developing countries in derogation from the MFN rules, for example the GSP system and the use of safeguard action for development purposes.

Developing countries, including the East Asian economies, focused on obtaining derogation from GATT principles to preserve special and differential treatment (S&D)[22] in trade negotiations and the right not to grant reciprocity for tariff reductions in their favour[23]. Thus the term S&D contains both an access component and a right-to-protect component (Whalley, 1990). This resulted in their retention of high unbound tariffs. They were also, under certain circumstances, entitled to lax

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[21] It has been claimed that "Strategic Theory" plays an important role in the early stage of economic development. This was true even in the case of developed countries such as the case of the US that imitated technology from the Britain and employed strategic policy in its early stage of economic development.

[22]. The term special and differential treatment (S&D) refers to various rights and privileges given to developing countries Contracting Parties to the GATT, not extended to developed countries. Developing countries have been committed to S&D treatment for themselves under GATT rules. They argued that trade problems of developing countries are special, for instance, balance of payments problems endemic to low-income countries make liberalisation difficult. They needed different treatment from developed countries in order to grow, that is, trade preferences in developed countries markets. They also asked for fair treatment, for example, an equalisation of tariffs on manufactured goods and raw materials and the elimination of tax escalation.

[23]. Part IV of GATT exempted developing countries from the need to make reciprocal concessions in trade negotiations. They could thus escape GATT disciplines.

treatment by resorting to Art. XII to safeguard their balance of payments, and under Art. XVIII to promote infant industries, especially by invoking Art. XVIII b which is the balance-of-payment escape clause for developing countries[24], and which allows the application of quantitative restrictions (QRs) to tackle balance of payments problems. Art. XVIII c permits developing countries to apply quantitative import restrictions for infant industry protection, and Art. XVIII a [25] allows developing countries to re-negotiate a tariff binding in order to promote the establishment of a particular industry. It was assumed that developing countries should have greater freedom to modify and withdraw tariff concession than do the developed countries. Art. XXVIII, bis (3) states that the need of developing countries to use tariffs for economic development and fiscal purposes, should be taken into account in tariff negotiations[26].

Over the years developing countries have claimed exemptions from GATT rules and this was formally agreed when part IV was added to the Agreement[27]. Thus developing countries, including East Asian countries, were able to follow the trade policies they chose at home while benefiting from liberalisation in developed countries. That is why the USA called developing countries "free riders" (Tussie, 1993: 79). However, the US and other developed countries also maintained their own

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[24]. Section b of revised Art. XVIII added in 1955 is more flexible than Art. XII, which is the basic provision on the use of quantitative restrictions for balance of payment purposes. Before its revision, developed and developing countries were alike in resorting to Art. XII. But when Art. XII was tightened up, it became necessary to provide a safety valve for developing countries under section b of Art. XVIII. Section a of Art. XVIII also assumed that developing countries should have greater freedom to modify and withdraw tariff concession than do the developed countries.

[25]. But Art. XVIII a was less practical as developing countries using this provision would be expected to offer compensation or face retaliation.

[26]. GATT (1955) BISD, 3rd Supplement, p. 49.

[27]. Art. XXXVI recognises the development needs of developing countries in improving market access, commodity price stability, diversification of economic structures and inter-agency co-operation and the non-reciprocity principle. Art. XXXVII contains a stand still commitment, and refers to fiscal or internal taxes. This article concerns the prioritisation of products of interest to developing countries in any trade liberalisation exercise, including in relation to tariff escalation. Art. XXXVIII provides for joint developed and developing countries actions in commodity field, inter-agency co-operation, possibility of studying the export potential of developing countries and related questions

protectionism and did a lot of free-riding under GATT, especially in the last two decades that have seen many derogations from GATT rules and the wide use of grey area measures.

Resulting from these derogations from GATT rules, East Asian countries were able to employ an import substitution policy in the early stage of their development, and were able to protect infant industries as well as using subsidies to promote projects and an export push policy. Moreover, developing countries, including East Asian countries, actually obtained better than MFN treatment through GSP arrangements. In fact, GSP arrangements were in principle inconsistent with GATT. GSP was previously authorised by a temporary waiver from the Most-Favoured-Nations provision of Art. I. But one result of the Tokyo Round, under the 'enabling clause', was the provision of a permanent legal basis for the extension of the GSP arrangement granted by developed countries to developing ones[28]. East Asian countries had also gained advantages from exports under the GSP scheme in North American and European markets.

Furthermore, the ASEAN Preferential Trading Arrangement, which entered into force on 31st August 1977, was approved by the GATT Council[29]. The Enabling Clause of GATT[30] allows the implementation of regional arrangements that are not justified under Art. XXIV[31]. The Agreement on ASEAN Preferential Trading

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[28]. GATT, the Tokyo Round of Multilateral Trade Negotiations, Geneva, April 1979, p. 149.

[29]. GATT (1980) *GATT Activities in 1979 and Conclusion of the Tokyo Round Multilateral Trade Negotiations (1973-1979).* Geneva: GATT. pp. 67-68.

[30]. The results of the Tokyo Round cover regional and global preferential arrangements among developing countries, under certain circumstances, not conforming to Art. XXIV to enable them to fulfil their objective under such preferential arrangements. And ASEAN was permitted to implement its Preferential Arrangement in this Tokyo Round.

[31]. Art. XXIV permitted regional economic group, may take a form of a customs union or a free trade area, as an exception to the general rule of Most-Favoured-Nation treatment, provided that certain requirements are met, intended to ensure that the arrangements facilitate trade with the outside world. Other special trading arrangements have been presented in GATT as being justified in the light of

Arrangement provides for tariff reductions for approved projects, the purchase of finance support at preferential interest rates, preferences in procurement by government entities, tariff preferences, and liberalisation of non-tariff and other trade measures. Member countries of ASEAN thus granted each other preferential treatment and waived the MFN rule. This favourable legal environment facilitated the growth of East Asian and ASEAN economies through export performance.

1.2 The Global Institutional Environment: the Changes and their Impacts on East Asia

This section will provide a brief discussion of the global institutional environment and its changes/evolutions that have had impacts on East Asia, and that have shaped the trade and investment policies of Asian countries (from import-substitution to export-push policies and an open market orientation, and now to the approach of balancing deeper regionalism with an open economy). This global environment is the main factor reinforcing the implementation of "Open Regionalism" of ASEAN.

The global trading system has been governed mainly by GATT. Since its emergence in 1947, GATT has played an important role in overseeing global trading activities, concentrating in its early years on trade liberalisation by removing border barriers. GATT was primarily concerned with the reduction of tariffs and elimination of quantitative restrictions, through a series of multilateral conferences, and based on principles of non-discrimination (Dam, 1970; Jackson, 1969). National Treatment provided in Art. III is aimed at preventing discrimination with reference to domestic and imported products, which imposes a general prohibition on the use of internal

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previous preferential or other relationships between the participants, or of the special provisions of Part IV of the General Agreement concerning trade of developing countries.

taxes and other internal regulatory measures so as to afford protection to domestic production[32].

However, developing countries claimed that their special circumstances and especially the different level of their economic development make them unable to compete with developed countries under the same conditions. They are economically small compared to developed countries, so their leverage in global trade negotiations is correspondingly limited. Their economies are concentrated on a few product lines, mainly agriculture, primary products and some basic manufactures. Hence they need special treatment, and they were not ready to reciprocate in trade negotiations. They needed to grow, and thus improved market access was very essential for them to enable their exports to gain access to developed countries' markets to increase their export earnings, for a sound balance-of-payments and to maintain foreign exchange availability.

Developing countries' concerns had been debated, and in fact a particular provision on developing countries had been included in the Havana Charter and was included in GATT (Art. XVIII). It permitted developing countries to withdraw tariff bindings under certain circumstances for infant industries. The 1955 Review Session amended Art. XVIII[33] by adding an authorisation to use quantitative restrictions for the same purpose, and also added a special set of criteria authorising developing countries

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[32]. This obligation clearly extends also to products not bound under Art. II and this is confirmed by the negotiating history of Art. III. See Japan - Taxes on Alcoholic Beverages Case. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

[33]. Art. XVIII divided into three major components covering different policy areas. Art. XVIII a allows developing countries to re-negotiate tariff bindings in order to promote a particular industry, but if invoking this provision developing countries have to offer compensation or face retaliation. Art. XVIII b is the balance of payment escape clause for developing countries only, its criteria for imposing quantitative restriction are less onerous than the criteria which apply to developed countries under Art. XII. Art. XVIII c allows developing countries to apply quantitative import restrictions for infant industry purpose, in order that new industry and production structures can be specifically established according to the development policy and economic strategy.

to impose import restrictions for balance-of-payments reasons. This allowed developing countries, especially East Asian and ASEAN countries to implement an import substitution policy during that period. However, Art. XVIII was limited to measures for developing each country's internal market[34], and did not deal with access to export markets.

Art. XXVIII bis (3) was also added in 1955. This article recognised the needs of developing countries to use tariffs for economic development and fiscal purposes by taking into account this necessity in tariff negotiation.

In 1963 developing countries called for an 'Action Program'[35] which included a standstill provision on tariffs and other barriers to developing country exports, duty-free entry for tropical products, and elimination of tariffs on primary products. The GATT Ministerial meeting recognised the need for a formal institutional framework for the contracting parties to deal with developing countries' responsibilities in reciprocal concession offers in tariff conferences. This allowed developing countries to gain market access in developed country markets without reciprocating to reduce their tariff rate at home.

However, the re-evaluation of the ineffectiveness of the import substitution policy caused developing countries to move toward an outward-oriented policy, which was especially the case for East Asian countries. They realised that this policy did not work well, spawning domestic inefficiency and a bureaucracy administering import controls, and importantly, inhibited export performance. The export-push policy

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[34]. Art. XVIII had its focus on the relaxation of GATT strictures to enable developing countries to pursue inward-looking policies based on protection and promotion of infant industries.

[35]. This program resulted from the 1956 GATT report on international trade, which drew attention to the disproportionate increase in exports in favour of developed countries and the instability of commodity trade of developing countries. GATT thus appointed a group of experts to examine international trade trends. This resulted in the Haberler Report (1958). See GATT (1958) *Trends in International Trade.*

supported by export-led growth theory led to the negotiation of Part IV[36] of GATT in 1965, which added three new Articles dealing with developing countries' concerns. Art. XXXVI recognises the development needs of developing countries, the importance of improved market access, commodity price stability and especially the non-reciprocity principle[37]. Art. XXXVII contains provisions[38] relating to the prioritisation of products of interest to developing countries in any trade liberalisation, including those relating to tariff escalation and the standstill commitment.

However, unlike other Articles of the GATT, Part IV contained no binding or obligatory commitments. Developing countries had also resorted to other organisations outside the GATT, especially UNCTAD[39], to press for their concerns. A key study for UNCTAD was the Prebisch Report "Toward a New Trade Policy for Development" of 1964, which advanced the preferences debate further. Prebisch recommended the granting of preferences to the industrial exports of developing countries by developed countries on a product-by-product and country-by-country

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Haberler Report. Geneva: GATT. Then developing countries put forward a resolution in the GATT calling for an "Action Program" to solve this problem.

[36]. Part IV concerns the access of developing countries to developed country markets. This implied the endorsement of the theory of export-led policies, as the perambulate section of Part IV states that "...the export earnings of the less-developed contracting parties can play a vital part in their economic development..." (Part IV: Art. XXXVI: 1 (b)).

[37]. Art. XXXVI: 8 stated that "the developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed countries". Trebilcock and Howse argued that "this principle of non-reciprocity, along with special dispensations for import substitution policies, are often referred to as 'special and differential status' for developing countries". The persistence of the inward-looking approach was reflected in this Article, which implied "that export-led growth is consistent with, and indeed should go hand in hand with, protection of developing countries' domestic markets", see Trebilcock & Howse (1999:371).

[38]. However, the loose words contained in Art. XXXVII did not provide legal binding obligations on developed countries and "the only remedy specified in Part IV where developed countries are not living up to these loosely-worded commitments is the possibility of a developing country requesting consultations either with individual developed countries or in the GATT Council" (Art. XXXVII, 2) as pointed out by Trebilcock & Howse (1999:371).

[39]. UNCTAD was found in 1964 as a periodic conference of all UN members with intention to establish a forum on trade where developing countries would find themselves less marginalised in the decision-making process than was the case with the GATT. See Trebilcock, Michael J. & Howse, Robert (1999) *The Regulation of International Trade.* London and New York: Routledge.

basis in a specific period of time and subject to renewal in order to strengthen developing countries' exports. This resulted in the emergence of the Generalised System of Preferences (GSP), under which developed countries would grant preferential treatment to developing countries on a selective basis. Subsequently, the GATT contracting parties agreed to suspend the MFN principle in favour of the GSP. This waiver of MFN was initially applied temporarily for ten years from 1971. GSP had been an important instrument facilitating export growth of ASEAN, especially in the European market and the North American market. This enhanced the industrialisation in East Asia that further propelled investment growth in this region as investors from both intra and extra Asian could gain advantages from the GSP schemes. This reinforced the success of the export-push policy of East Asian countries.

Also, the Tokyo Round of 1973-79 resulted in an agreement on several aspects of the so-called Special and Differential Treatment for developing countries, under which developing countries are given special treatment with respect to Art. XVIII, Art. XXVIII bis (3), and the new Part IV of the GATT. In addition, the 1979 Framework Agreement known as the "Enabling Clause" provided a permanent legal status for GSP, and covered regional and global preferential arrangements among developing countries that do not conform to Art. XXIV of the GATT. However the Enabling clause contains the celebrated "Graduation" Provision which states that developing countries recognise that as their economies grow stronger, they would participate more fully in the GATT framework of rights and obligations (GATT, 1986).

Over the years, there have been serious tensions between developed and developing countries over trade. While developed countries made significant reductions in tariff barriers, developing countries received special treatment that

exempted them from complying with GATT rules, especially in reciprocating their concessions. This caused developed countries dissatisfaction with what they see as developing countries derogating from GATT rules. Thus in several GATT Rounds, developing countries' concerns were disregarded. Developing countries, for their part, felt that the GATT was incomplete in its coverage of issues of importance to them, especially in agriculture. Moreover, the 1961 Short-term Agreement on Cotton Textiles and its enlargement into a long term agreement with wider product coverage, which, in turn, led to the MFA in 1974, intensified the perceptions of developing countries that developed countries are unwilling to allow liberalised trade in product areas important to developing countries. In the 1970s and 1980s the growth of voluntary export restraints (VERs), the widespread use of countervailing and anti-dumping duties[40] against developing countries, and the threats of use of safeguard measures against developing countries ever more intensified developing countries' mistrust of developed countries. They saw developed countries using these measures as disguised trade restrictions toward them. At the same time, developed countries showed reluctance to grant the Special and Preferential Treatment which had been agreed in Part IV of GATT[41], in other words developed countries had not lived up to

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[40]. Anti-dumping actions had become a favoured instrument of protection by developed countries. From 1980-1986, Australia, Canada, the European Community (EU) and the United States were recorded to account for 1,276 cases out of the total of 1,288. Between 1987 and 1989, 354 actions were initiated, 76 by the EC Commission, 97 by the United States, 79 by Australia and 55 by Canada. The number of actions against developing countries rose from 8 in 1981/2, to a peak of 69 in 1985/6. The majority were against the four Asian NICs. Between 1980-7, the US brought fifteen cases against China, see Page Sheila, Davenport, Michael and Hewitt, Andrain (1992), p. 45. From 1981-1990 the European Community took 402 actions and the incidence of actions against developing countries has increased. See GATT, (1991) *EC, Trade Policy Review.* Messerlin demonstrates that quantities of imports are sharply reduced after successful anti-dumping actions, particularly where anti-dumping *ad valorem* tariffs are imposed. He estimates the average direct costs of a successful EC anti-dumping action, in term of loss of export volume and of trade diversion to other suppliers, at 25% of the value of exports for the NICs and 17% for other developing countries. See Messerlin, Patrick (1988).

[41]. Part IV of GATT, the Special and Differential Treatment, exempts developing countries from having to reciprocate reductions in trade barriers made by developed countries, to the degree that such reciprocity would be inconsistent with their development needs. In fact, non-reciprocity by developing

their commitments[42]. Thus developing countries have seen GATT as a rich man's club, and did not actively participate in GATT Rounds, as they could not see that any further improvements would be made. They believed that they were too small to exercise much leverage to make developed countries change their position.

Outside the GATT, protectionism increased in the forms of both aggressive unilateralism and regionalism (Bhagwati, 1990). For instance, the United States' Super 301 provision of the Trade Act to sanction "unfair trade practices" has been used selectively against targeted countries[43]. Developing countries see this practice as the naked use of power to extract trading gains from weaker powers.

The United States and the European Community (EU) implemented anti-circumvention measures to attack low-price competition from foreign owned plants in the US and the EU. A number of developing countries' firms, particularly from South Korea and Taiwan, opened such plants in the EU and the US. The host countries threatened that existing firms would face anti-dumping duties on imported components without a specific investigation. The effect was that investment by potential new entrants could be deterred.

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countries was formally accepted in the General Agreement under Art. 36:8 of Part IV, see GATT (1974b) BISD 20th Supplement, p.63 and GATT (1986) BISD 32nd Supplement, p.30-31.

[42]. In the Declarations launching the Kennedy, Tokyo, and Uruguay Rounds, developed countries have on each occasion accepted the principle of non-reciprocity, and references to Part IV and Special and Differential treatment have been included. In practice, however, developed countries have never fully accepted the concept.

[43]. For example, the US exempted Singapore from its GSP, despite earlier assurance to the contrary if Singapore agreed to stop infringing US copyrights and trademarks. The US also retaliated against South Korea citing infringement of intellectual property rights. Also, the US forced Thailand to open its cigarette market for US cigarette exports. Thailand argued that Thailand has had policy to reduce cigarette smoke and protect young generations from being addicted to cigarette. But the US used section 301 to threaten to exempt Thai exports from the US GSP on the ground that Thailand also has domestic cigarette producers, so the refusal to open its cigarette market is a kind of protection. The US also won a favourable GATT Panel decision on this. Finally, Thailand has had to liberalise trade in cigarette from the US for the exchange of GSP right. However, Thailand was partially graduated from the US GSP eventually.

Additionally, developed countries gradually graduated developing countries from their GSP schemes. East Asian countries have been targeted as their economies developed "*efficiently and competitively*"[44]. Developed countries had argued that:

> "In the long run, if the economies of developing countries were to develop more efficiently and competitively, it would be in the interest of these countries periodically to examine their protective policies and to assume some commitments" [45]

The celebrated Graduation provision also stated this obligation and the concept of graduation has been invoked by the developed countries to graduate, especially, the NICs from their GSP schemes.

In the 1980s, great frustration was evident on the part of both groups of countries, so that there was clearly an urgent need to set better rules for the trading system[46]. This coincided with the new issues which were emerging, and developed countries argued in favour of incorporating these issues under the GATT umbrella as they regarded trade-related issues that could be more effectively dealt with if brought into trade negotiations. This led to a debate in the Uruguay Round to extend the scope of GATT to cover the new areas as well as to re-evaluate the existing GATT rules and to re-organise the GATT structure.

However, there have been many factors, which have encouraged developing countries to re-think and re-evaluate their economic policy, partly resulting from the change of their perception toward rule-based trading regimes. They realised that to claim special and favourable treatment did not really work well, even though the

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[44]. In the late 1980s, the US and the EU both graduated Korea from their GSP schemes. The US also graduated Hong Kong, Singapore and Taiwan. In early 1989, Thailand was partially graduated from US GSP.

[45]. GATT (1969) BISD, 16th Supplement, Geneva.

[46]. The GATT Ministerial Meeting of November 1982 indicated the strains in the relationship between developed and developing countries: "Existing strains have been aggravated by the differences of perception regarding the balance of rights and obligations under the GATT, the way in which these rights and obligations have been implemented and the extent to which the interests of different contracting parties have been met by the GATT", see GATT (1983) BISD, 29th Supplement, p. 10.

derogation from GATT rules benefited them in the early stage of their development. But later this resulted in the difficulties they gradually faced from the protectionism of developed countries, as their derogation from GATT rules became the justification for developed countries to erode GATT rules too, and to maintain high protectionism against them, especially in the products of interest to developing countries such as textiles and clothes, shoes, and electrical appliances. Thus the only way that they could ensure that developed countries would comply with the rule-based trading system was if they themselves fully participated in GATT negotiations. Once developing countries were strict in complying with the rules, developed countries would have a moral obligation and commitment not to break the rules themselves. And this has signalled to East Asian countries to move forward to the more open trade and investment regime. Even before the conclusion of the Uruguay Round most Asian countries had unilaterally liberalised their trade and investment (see chapter 4).

On the other hand developed countries saw the necessity of improving the trade relationship between the two, as some developing countries were becoming potentially important export markets, especially in the services sectors. Individual developing country markets were becoming more important to developed countries, and there was growing awareness of this fact. Thus, developed countries attached increasing importance to developing country participation in GATT disciplines (Whalley, 1989a). The changing global economy narrowed the gap between developed and many developing countries and enhanced the need for the two worlds' relationship to be more closely linked. By the time the Uruguay Round began, developing countries had taken important and major first steps by their unilateral liberalisation and more active participation in GATT, and they had moved a long way towards the goal of fuller participation set for them by developed countries. They now felt that

developed countries had an important moral obligation to foster the development of the rule-based system and to refrain from the use of measures violating legal obligations (Jackson, 1995).

1.2.1 The Uruguay Round and the WTO

Prior to the launch of the Uruguay Round there had been various tensions, and the erosion of the GATT rules led to the fear of the deterioration of the world trading system and international economic relations. Movements toward protectionism, bilateralism, and regionalism seemed to threaten the liberal world trading system and led to a more fragmented world. While tariffs had been successfully reduced[47] during the several rounds of GATT negotiations, non-tariff barriers have grown or become more evident and they were considered more dangerous than tariffs as obstructions to international trade[48]. NTBs have come to be considered as the greatest threat to a fair, liberal world trading system.

In fact, non-tariff barriers issues were not unnoticed during the Tokyo Round of trade negotiations, and the NTBs codes were negotiated to restrict and regulate the use of NTBs. However, the spread of technical barriers to trade and the phytosanitary and health protection standards are unwittingly created trade barriers, due to the differences in the standards and regulations applied in different countries.

Non-tariff barriers are more difficult to tackle, as they encompass all private and governmental laws, regulations, policies and practices that serve to restrict or to distort the volume, commodity composition, or direction of international trade in goods and in services, as well as any distortion or restriction that can possibly reduce potential real income (Pestieau & Henry, 1974). This involves a wide range of

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[47]. Tariffs were cut until today they are less than 5% on most industrial products.

regulations such as packaging, labelling, mark of origin requirements, health and sanitary regulations, safety and industrial standards, border tax adjustments, custom clearance procedures, custom-valuation and custom-classification procedures.

All these intense situations called for the reformation and strengthening of GATT rules in order to preserve the liberalised world trading system, to incorporate agriculture and textiles issues into GATT as well as to bind contracting parties to agreed multilateral standards in other relevant areas, at least to assure that there is a common standard of rules for governing international relations.

In addition to these major problems, the emergence of new issues, trade in services, trade-related issues in intellectual property and investment, were demanded to be included under GATT. In fact many of these issues had already been negotiated in the Tokyo Round such as non-tariff barriers to trade, even the new issues of services and intellectual property and investment were discussed and studied since the early 1970s (Griffiths, 1975; Baldwin, 1979). However, it was in the Uruguay Round that these new issues were introduced and successfully incorporated in the GATT/WTO legal framework including a reformed and restructured of GATT, particularly, the creation of the WTO establishes an obligations to bind all contracting parties to the whole package of GATT/WTO rules. These include a number of provisions that impact on the East Asian countries, especially in strategic policy and the role of government intervention in economic development.

1.2.2 The Results of the Uruguay Round and their Impact on East Asian Countries

The results of the Uruguay Round brought about a new legal environment that affects East Asian countries' strategy and policy, especially their trade and investment

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[48]. As much as 50% of world trade is now affected by this new protectionism, see Salvatore, Dominick.

regimes, laws and regulations. These changes are both in revisions of the existing rules and the expansion into new areas of the WTO.

The first and foremost change is the establishment of the World Trade Organisation (WTO) to succeed the General Agreement on Tariff and Trade (GATT). The liberalisation of global trade that followed the conclusion of the Uruguay Round has synchronised with East Asian countries' own liberalisation efforts. These economies were well placed to take advantage of the positive trading climate. However, global trade liberalisation also meant increased competition for investments and for markets. The East Asian countries would have to gird themselves to play by the rules, as well as to ensure that the others also play by the same rules. In fact East Asian countries, especially ASEAN countries, are heavily dependent on international trade in goods, services, and technology as well as on foreign direct investment flows. As such, ASEAN and East Asian economies collectively and individually need to be proactive in helping shape the WTO agenda and programmes.

The success of the Uruguay Round was the most ambitious goal ever achieved under the GATT. It succeeded in bringing all contracting parties into line to comply with the whole package of GATT/WTO rules as well as to comply with the other areas of global regulations establishing minimum standards for each contracting party to deal with each other under the umbrella of GATT/WTO[49]. The results of the Uruguay Round created a new trading regime under which the *regulatory differences,* i.e. the

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(1993) p. 1.

[49]. The WTO agreement provides in Art. XVI (4) that "Each Member shall ensure that its laws, regulations and administrative procedures conform with its obligations as provided in the annexed Agreement" (under the GATT 1994 Agreements). If a participating nations fails to ensure that its laws are in conformity with its obligations under WTO Agreement as mentioned above, then that nation will either (a) have to bring any domestic law into conformity with the rules of the WTO Agreement, or (b) offer compensatory market access to the nation which has complained about the failure to conform with obligations, or (c) to accept the retaliatory withdrawal of market access by the complaining nation. The

differences of internal rules and regulation of the individual country, have been focused upon and dealt with at a certain level. The reformation of GATT rules has been part of the process of global regulatory reform. In fact, on the one hand, these changes have been the results of the changing global economy and society, and of the process of globalisation, and on the other hand, global regulatory reformation further facilitates and encourages globalisation in turn.

Globalisation has stimulated various concerns and changes in the global economy and society. The broader agenda of this process has been the reduction or elimination of all barriers either in the form of border or non-border barriers. Thus it has not been limited to a particular area, but includes legal, economic, political and social factors (see Table 2 "Summary of the Uruguay Round Results in Relation to Developing Countries", p. 43).

The extension of WTO to cover investment issues has had a crucial impact on ASEAN countries. The obligations of ASEAN countries under the new agreements, i.e. TRIMs, GATS and TRIPs, has required them to revise their laws and policies dramatically. TRIMs deals with specific trade-distorting investment measures (performance requirements)[50]. These include local content requirements, export performance requirements, trade-balancing requirements, and foreign-exchange-balancing requirements. These measures have been considered to be within the jurisdiction of the WTO as they directly affect trade. However, they also take the WTO into the field of investment regulation. Nevertheless, while TRIMs centred on performance requirements employed in developing countries, it did not affect

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compensation and the retaliation must be proportionate in value to the impairment of right or market access opportunities that were caused by the failure to conform. See Davies, Denzil,Rt. Hon. (1995).

[50] The Illustrative List in the Appendix to the Agreement on TRIMs indicates the measures that WTO Members must eliminate.

comparable measures such as cash grants or tax breaks employed in developed countries (Moran: 1992a: 62-63)[51]. This is because TRIMs only prohibits measures that are "mandatory .....or compliance with which is necessary to obtain an advantage". This lopsided development of TRIMs makes developing countries see themselves as being in a disadvantaged position in exercising national policy to attract foreign investors.

Most ASEAN countries have employed performance requirements[52] in conjunction with investment incentives for attracting foreign direct investment, usually as prerequisites for approving the entry of foreign investors (see chapter 4). Since these measures are considered, under the TRIMs, as directly distorting trade, ASEAN countries have to eliminate all these measures to comply with the rules of the WTO. This directly affects their investment laws and regulations as well as their investment policy and regimes.

The GATS deals with services liberalisation by facilitating market access of service providers from one WTO member country into other member countries, who have committed themselves to open their domestic market for all services under the GATS, subject to MFN exemptions and reservations made under their Country Schedule and Schedule of Specific Sectoral Commitments (limitations on market access and limitations on National Treatment). The definition of modes of service provision (mode of supply) in GATS covers all types business transactions, so it inevitably involves investment. In particular, supply via commercial presence of service

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[51] Moran revealed the substantial dimensions of locational inducements currently offered by European and United States to attract, for instance, automobile, petrochemical and computer facilities. European Governments offer cash grants up to 60% of the cost of the entire investment; United States have given as much as US$ 325 million per project or US$ 108,000 per job to foreign firms. It is incredible that average state expenditures in the United States to induce inward investment and to promote exports have grown over the last decade by more than 600%!

providers entails an establishment in the recipient country, and hence involves investment. Until now, foreign service providers often have to go through the approval of entry and operation in the recipient country. ASEAN countries have restricted service sectors for foreign investment and for foreign service providers, such as in banking, insurance, telecommunications, transportations and professional services. Negotiations under the GATS create commitments to liberalisation of services. This will require ASEAN countries to change their laws and regulations relating to services, including their investment regimes involving foreign commercial presence, and to liberalise internal regulations concerning their service sectors. GATS also permits a more rapid regional liberalisation of services, which now ASEAN has undertaken in its GATS-Plus Scheme (see chapter 5).

TRIPs deals with Intellectual Property protection to ensure that international laws and regulations on IP have been effectively accepted by and enforced in WTO Members. TRIPs also affects investment, especially in the field of sophisticated technology investment. ASEAN has responded to these altered global IP regimes by launching the Framework Agreement on Intellectual Property Co-operation in 1995, with the intention of ensuring co-operation among ASEAN countries in applying IP laws and regulations and the effective enforcement of IPRs. Even though no significant progress has been made regionally in the past, ASEAN countries are beginning to develop IP co-operation and to explore the possibility of setting up an IP centre in the region (see chapter 5). Substantial development of IP laws will mainly be made at national level, as individual ASEAN countries have been embarking on the process of promulgating IP laws that have never been established systematically in

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[52]For instance, ASEAN countries apply local content requirement for promoting domestic industries. This measure falls under category 1(a) of the Illustrative List of the Agreement on TRIMs.

these countries before. This is due partly to pressure from the US and partly to commitments under the WTO.

Therefore, the altered global legal frameworks, especially the new package of WTO agreements, have had a crucial impact on ASEAN law and policy reform. ASEAN has now come to a transitional period in a new era in its development. Indeed, the changing external legal and economic environment has been regarded by some as an ingredient in a blend of many factors and causes of the Asian misery.

1.3 Asian Misery: The Causes and Effects

The 30th anniversary of the founding of ASEAN took place amidst economic turmoil and financial crisis. This initially occurred in Thailand, and then spread to Malaysia, the Philippines, Indonesia and further affected Korea and Japan, as well as other economies in the region. The region's woe raised the question of the end of Asian miracle, but most of all required an analysis of the causes to guide the strategies to recover from the crisis and develop long term plans for improving their economies. What were the reasons for this collapse, in the region with the highest economic growth for many decades, and which economists lauded as an example for the other developing countries?

The root causes of this situation in ASEAN were perhaps a combination of the impact of changes in the global economy, its trading regimes, the liberalisation of financial markets in the region without prudential measures and sufficient control in financial institutions, protectionism in western markets as seen from the drastic export slowdown of ASEAN countries. All these causes hampered the ASEAN economy and inevitably affected the rest of the region, especially Japan and Korea which are closely linked to the ASEAN member countries' economies.

The crisis, in fact, indicates a fundamental need to change ASEAN policy toward regionalisation. Thanks to the currency turmoil, ASEAN countries take the opportunity to rethink their dependence on the US currency and take measures to combat the instability of their currencies. Also the dramatic decline of ASEAN exports, they need to adjust their industrial policy and investment regimes, laws and regulations. The changing global economy and the new approach to a co-ordinated international trading regulatory regimes, and the interaction and interdependence of various global institutions have created a new socio-economic and legal environment to which ASEAN must adopt. Any further Asian miracle is unlikely to be based on the previous combination of legal and socio-economic factors.

1.3.1 Drastic ASEAN Export Slowdown: Impacts from External Economic Dependence

Prior to 1996, the exports of the four ASEAN countries (Indonesia, Malaysia, the Philippines and Thailand) grew uninterrupted at high rates over a long period. In 1995, Indonesia's exports rose 13.0%, those of Malaysia 25.9%, those of the Philippines 28.9% and those of Thailand 23.6%. Suddenly, export growth of those four ASEAN countries slowed down sharply, to those of Indonesia 9.5%, those of Malaysia 5.6%, those of the Philippines 17.7%, and those of Thailand posting a negative growth rate of -0.2%. Table 3 shows how ASEAN exports sharply dropped in their major markets, in the EU, the US, and even in the Japanese markets.

Especially in the case of Thailand, where the crisis first occurred, Thai exports severely and dramatically dropped down in its world markets. Table 4 shows this sharp downward trend in Thai exports.

Table 3
The sharp drop in ASEAN exports before the Asian Crisis
(% of yearly growth rate)

Trading Partners	1994	1995	1996	1997
European Union	19.8	30.0	**9.1**	7.5
The US	22.9	19.4	**6.7**	4.3
Japan	12.0	16.7	**9.2**	8.2

Source: Trade Statistics Centre, Dept. of Business Economics, Thailand

Table 4
The sharp drop in Thai exports before the Asian Crisis
(% of yearly growth rate)

Trading Partners	1994	1995	1996
World	20.9	23.6	**-0.2**
Japan	21.8	21.5	**0.6**
The US	18.2	4.8	**1.2**
European Union	18.6	19.4	**6.0**
ASEAN	35.1	35.2	**-0.3**
Other	21.8	33.8	**-2.7**

Source: Trade Statistics Centre, Dept. of Business Economics, Thailand

The principal causes of this abrupt weakening trend were firstly, the major trading partners' implementation of more complicated regulations concerning trade-related issues, such as health, labelling, environment, labour, sanitary and phytosanitary protection measures, so that ASEAN exports encountered more difficulties in penetrating world markets. This sharp export decline immediately followed the implementation of the GATT/WTO new trade regime that legalises regulatory requirements, provided they are legally implemented in importing countries consistently with GATT/WTO rules[53].

[53]. For instance, protection under Art. XX General Exceptions, either on the ground of the protection of animal or plant life or health, or relating to the labour issue, public moral, they must now comply with the Agreement on Sanitary and Phytosanitary Measures (SPS), Agreement on Textiles and Clothing, and Agreement on Technical Barriers to trade (TBT).

Secondly, most ASEAN exports were being graduated from the GSP scheme. For instance, under the new EU GSP System launched in 1995[54], ASEAN countries were targeted for GSP cuts. Products regarded as being very sensitive under new EU GSP scheme that affect ASEAN exports are nine categories (three being agricultural and six industrial) including fishery products, vegetables and fruits, prepared foodstuffs, plastics and natural rubber products, leather products, apparel, garments, footwear, ornaments and electrical/household appliances. This mostly affected ASEAN exports as these categories of GSP cuts affected the main ASEAN exports to the EU. For instance, in the case of Thailand, Thai exports received GSP privileges altogether totalling US$ 8,984.8 million in 1994 and US$ 9,984 million in 1995. Of these, exports given privileges by the EU accounted for US$ 4,453.6 million and US$ 5,348.6 million, or 49.6% and 53.7% respectively. These export amounts given GSP privileges by the EU made up 66.2% and 62.6% of total Thai exports to the EU, which were US$ 6,723.2 million and US$ 8,542.6 million. Manufactured exports to the EU under the GSP cover were US$ 3,844.7 million and US$ 4,681.3 million, equivalent to 86.3% and 87.5% of total export to the EU that enjoyed GSP privileges or 57.2% and 54.8% of overall exports to the EU[55]. Thus the cuts in the EU GSP drastically affected Thailand's exports as more than 50% of their exports enjoyed GSP privileges in the EU market (see Table 5). The cuts of EU GSP similarly affected other ASEAN exports to the EU as they all have the same categories of exports to the EU[56].

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[54]. The EU began to grant Generalised System of Preference (GSP) privileges to agricultural and industrial products in 1971, with the implementation period of a GSP project lasting 10 years. Then following the completion of the second project in 1990, the EU extended the implementation period of this project on a year-by-year basis from 1991 to 1994. From 1995 has been the third GSP scheme that no longer grant privileges to 'extremely sensitive products' having a strong impact on similar products in the EU and products of the type that need specialised production from the third country.

[55]. The Foreign Trade Department, Ministry of Commerce, Thailand.

[56]. See List of Products and Countries targeted for GSP cuts by the EU, the Third GSP scheme of the European Union 1995.

Table 5
The value of Thai exports enjoying GSP Privileges
(US$ million)

GSP Donors	1994 Value	1994 % Share	1995 Value	1995 % Share
European Union	4,453.63	49.57	5,348.63	**53.57**
The US	2,486.54	27.67	2,394.49	23.98
Japan	1,283.89	14.29	1,670.16	16.73

Source: Foreign Trade Department, Thailand

Consequently, ASEAN's ability to compete in the sale of these products against its rivals in the EU market was much affected. Since, the GSP system constitutes the giving of trade privileges on a non-reciprocal basis, it can therefore, be revoked at will by the donor countries. The US also was on the way to graduating all ASEAN exports from GSP[57]. Since the main ASEAN exports encountered higher tariff rates that made ASEAN exports' prices in western markets much higher than before, ASEAN exports declined suddenly.

Thirdly, competitive capability was eroded in exports of labour-intensive products, such as textiles and footwear. ASEAN countries lost their comparative advantages on cheap labour to their competitors such as China, India and Bangladesh, which have even cheaper labour costs. Thus they were gaining larger market share in western markets because of their cheaper product prices. In ASEAN, these industries are on the way to becoming 'sunset industries'.

The export slowdown directly impacted on the currency value of ASEAN countries and led to the instability of their currencies. This led currency traders to believe that ASEAN would lower the value of their currencies as a means to stimulate growth of their exports, as the lower value of their currency would lower the price of

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[57]. Singapore completely graduated from US GSP, Malaysia, Indonesia, the Philippines and Thailand partly graduated from US GSP as well.

products. In fact, ASEAN governments tried to maintain their currencies' value[58]. Unfortunately, the US dollar strengthened against the Japanese Yen. Consequently, ASEAN currencies, which were virtually pegged to the US$, appreciated accordingly. This even further reduced ASEAN's competitive edge in the world's leading markets. In addition to their worse competition position, the price of their exports went even higher, so that they lost their market share to their competitors. This further exacerbated the ASEAN export slowdown even more.

In addition to the drastic export slowdown, the current account deficit problem has been chronic, bedevilling ASEAN over a long period. A root cause of this problem is due to the large importation of machinery and intermediate products. The large current account deficit combined with overvalued currencies in ASEAN made them a target for the speculators. They were apparently grave enough to precipitate off and on attacks on ASEAN currencies. The ASEAN governments used up a large proportion of their countries' international reserves in their efforts to prop up the currencies. In the end, ASEAN currencies were floated, thus changing the foreign exchange system from a link to a basket of currencies, mainly the US dollar, to a managed flotation.

1.3.2 Offshore Loans and ASEAN Economic Crisis

ASEAN economic expansion during the past has been boosted mainly by foreign funds, which have flowed copiously into this region. Since ASEAN countries' central banks play a key role in regulating interest rates for the purpose of domestic savings, the internal bank's prime rate was high. For instance, Thailand's prime rate, the MLR, in 1996 stood at 13.0%, that of the Philippines 14.5%, that of Indonesia 20.0%, and that of Malaysia 9.2%. As a result, the majority of investors turned to

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[58]. The reasons given for this was a currency depreciation would bring in many problems, particularly the augmented private sector's foreign debt burden and rampant inflation.

borrowing from abroad where interest rates were lower. As over the past decades, ASEAN enjoyed high economic growth, becoming newly industrialised countries and potential markets that have attracted world-wide attention. Bond issuance by private sector companies in overseas markets has experienced strong demand. As a consequence, borrowing from overseas rose sharply, boosting the foreign debt burden.

A high degree of dependence on foreign sources of funds has been a weakness of ASEAN, particularly because a good deal of the foreign borrowing took the form of short-term loans, which could be obtained easily. On the one hand, these loans have been used rather carelessly, having been invested in most cases in sectors, which were not truly productive. For instance, they have been used for speculation in the stock market and in the real estate business[59], the latter to the extent that a large oversupply materialised. Thus the risk in repayment of foreign borrowings heightened. On the other hand, offshore loans for foreign investment in ASEAN, especially for Japanese investors who invested in ASEAN countries, in the export-oriented industries suffered losses from the drastic export decline. The ability to service debt was severely limited. Both factors weakened the credibility of ASEAN countries.

1.3.3 Conclusion

Thus, the causes of economic crisis in ASEAN involve a combination of factors. The emergence of new global trading regimes and regulations and the suspension of GSP make it more difficult for ASEAN exports to penetrate their major

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[59] For example, 58 finance companies in Thailand were closed down due to over-financing in real estate business and loans for trading in stock market (mainly for speculating rather than long-term investment). It appears there was an oversupply of real estate throughout the country, especially in Bangkok, and when the crisis took place that real estate was abandoned by the speculators leaving the building unfinished and failing to repay the finance companies. Therefore the finance companies collapsed because of overwhelming bad debts. This situation was similar in all ASEAN countries. See Limthammahisorn, W. (1997:1-15). Also see "Asia's Economic Crisis: How far is down?" *The Economist.* 18 November 1997. Further relevant discussions are also available at website

markets. Declining industrial competitiveness came to haunt the economy. Inadequate attention to human resource development and industrial upgrading and over-reliance on labour-intensive industries characterised the industrial scene. With costs of doing business rising, the emergence of lower-cost competitors, and increasing efficiency in global markets weakened the competition position of ASEAN. Increased capital inflows resulting from financial market liberalisation in the early 1990s exposed rigid exchange rate policies, inadequate regulation of financial institutions, and a speculative real estate bubble. These factors converged almost at the same time. In 1996 and early 1997 stagnating exports combined with the meltdown in the stock market and the disclosure of large non-performing loans in the financial sector.

Facing financial crisis by the middle of 1997, ASEAN countries had to put their house in order, which has been fundamental to their recovery from the crisis. ASEAN governments were compelled to seek the financial and technical resources of the IMF, the World Bank, the Asian Development Bank, and of other nations. The move to create a rescue package followed a serious depletion of ASEAN's reserves, spent defending the ASEAN currencies before they went into a managed float in the middle of 1997. There were costly attempts to support over-extended finance companies and other institutions after ASEAN's once-booming property market and export sector entered a negative cycle. The dramatic decline of exports caused the export-oriented industries to suffer losses and to encounter difficulties from debt services, which mainly borrowed short-term-loan from offshore and they could not roll over such debts. The ASEAN currencies depreciated about 20-50% against the US dollar, increasing the cost of servicing ASEAN countries' massive foreign borrowing.

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http://www.europe.economist.com/e..al/freeforal/current/sf0983.html. See Limthammahisorn, W (1997: 1-15)

Over-investment had caused excessive levels of external debt, which in turn grew into an unacceptably high current account deficit. Over-valuation of the ASEAN currencies, which have been pegged to the rising dollar, combined with these forces to cause capital flight and a weakening of ASEAN's financial systems after three decades of continuous economic growth. Developments such as a regional slowdown in exports, a fall in the stock market, and structural pressure on ASEAN due to the emergence of several lower-cost competitors, exacerbated the region's fiscal position.

The recovery program of affected ASEAN countries focused on two areas. The first is financial institutions, for which a comprehensive restructuring plan was drawn up. The second involved looking at more long-term issues related to competitiveness in the so-called 'real' or productive sectors. These include proposal for professional training and other human resource development, to industrial upgrading and enterprise privatisation. The programme allows at least two to three years to completely recover from this crisis. Also all ASEAN countries have to restructure their economy and especially their financial sector. The ASEAN misery has prompted the real need to re-think a new direction for ASEAN regionalisation.

1.4 Implications for East Asian Countries

As discussed earlier, East Asian economies had grown steadily and suddenly collapsed, due to combination of factors that generally affected by the global legal and economic environment. It has long been believed that the relative openness of the post-war trading system has been crucial to their growth. Before the Uruguay Round regime and the Asian crisis, it could be argued that the remarkable feature of these economies was their ability to grow even in the presence of significant restraints on their exports, and in the absence of any firm disciplines to which they could appeal, to limit trade actions against them. For example, most of these countries have passed

through initial period of GDP growth where exports of textiles and apparel have been crucial to their trade growth[60]. These products have been one of the most heavily trade-restricted areas with trade restraints under the MFA, but little of this seems to have had a major impact on the growth performance of these economies. This had happened partly because of the advantages enjoyed by East Asian exporters under the GSP scheme in Europe and North America. The concern then for these countries is whether a new regulatory regime, i.e. a post-Uruguay Round regime, may possibly impose new trade restraints on them, and the withdrawal of privileges, previously granted to them, may put them in a less advantage competitive position. Also industrial countries' use of anti-dumping and countervailing duties is likely to continue and may even accelerate (Hamilton and Whalley, 1995: 43).

The reformation of the global trading system therefore has major implications for East Asian countries. In many ways, the new rule-based trading systems of the WTO will be more beneficial to them and afford them more leverage in negotiating with developed countries. The more they comply with the rules, the more they can be guarded by the rules, and they will be fully entitled to the right and obligations[61] set under WTO. This will also show that developing countries are moving toward meeting developed countries' demands for their fuller participation in the trading system. In conclusion, the new global legal and economic environment implies that East Asian

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[60]. For example, in Korea during the early stages of industrialisation, textile and apparel exports were as large as 50% of exports.

[61]. Hamilton & Whalley (1995) pointed out that "the benefits developing countries can get from a multilateral trading system depend upon what they can gain from an affective rules-based multilateral system of discipline. The main benefits is to set limits on the trade policy behaviour of other countries, particularly more powerful developed countries. Effective discipline provides better assurance of access for developing country exports to developed country markets, and in addition, limits their ability to distort third country markets by means of export subsidies. The smaller and weaker the country, the more value there is in multilateral discipline, for it is only through such disciplines that small countries can restrain the behaviour of larger and more powerful governments. As a group, therefore, and since they are small, developing countries stand to benefit from multilateral source of discipline", see Whalley (1989a) p.11.

countries have to enhance their openness or market-orientation and develop a rule-based trading system in the region consistent with the global regulatory regime.

1.5 Economic Interdependence in the Asia-Pacific Region

Historically, regional interdependence in East Asia was substantial at the beginning of the twentieth century. In 1938, 67% of East Asian trade was intra-regional (Petri: 1993b). At that time, most of this trade went through the entrepot ports of Hong Kong, Singapore, Shanghai, and Manila. These ports not only handled trade between the colonies and the European powers, but also helped co-ordinate a vast network of commerce stretching from India to Japan and China along the Pacific Rim[62]. In this period, the high interdependence within the region was influenced by the western powers that laid down trade routes and that channelled trade through the main ports in the region.

1.5.1 The Surge of Japanese Economic Power

The interdependence of East Asia continued to intensify between the two world wars. The wars highlighted the complementarity of the region's economies and weakened their ties with western colonial powers as war made sea transport unsafe. The foundation for the post-war economic interdependence in the region had been laid. This period saw the increasingly important role of Japan in linking regional trade initially with Korea and Taiwan and then throughout the region. Japan had displaced the Netherlands as Indonesia's largest trading partner and also replaced England as Malaysia's largest trading party. Japan also invested in China, replacing investors from Great Britain. Also Japan began to develop Korea and Manchuria and sought

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[62]. For example, Singapore mediated 70% of Thailand's trade, sending Thai rice to China and Japan in exchange for textiles from India and England.

deep changes in these countries by making large investments in transport and communication.

1.5.2 The Decline in Economic Interdependence in the Region

The two world wars left East Asia in disarray, disrupted by the collapse of pre-war institutions and political relationships, insurrections, and civil war. Economic interdependence in the region dramatically declined. Intra-regional trade became relatively less important as trade flows abruptly shifted toward the United States. Furthermore, the region developed stronger connections with North America and with European countries. This coincided with industrialisation of East Asia and the export push policy that encouraged new products and manufactured output in large volumes needed to seek world markets. Then these products needed to be exported to the larger markets, i.e. the North American and European markets. During this period (1970s) intra-regional trade dropped down to less than 30% of its total trade.

1.5.3 The New Trend of Economic Integration in the Region

The intensity of East Asian trade links, after a long decline, is once again on the rise, with an increase of intra-trade from 29% in 1970 to 41% in 1993 of the total trade of the region. The 1980s began to see East Asia trade more internally, simply because its markets have become so important. Rising costs in Japan and the newly industrialised economies have shifted industries to other East Asian countries, increasing the regional trade in components and machinery. Also, more liberal trade and investment policies are opening East Asian markets, though some scope remains for more action.

However, East Asian ties to North America and Europe are still very important [63], because more than half of the region's trade still depends on extra-regional markets. However, the region's own markets are also increasingly critical to the sustainability of its growth in the future. Intra-regional trade and investment is now the main engine in sustaining and strengthening economic growth in the region. As trade and investment played a vital role in the structural development of East Asian economies, today the region's prospects are crucially linked to openness in trade and investment. It is in the region's interest to take initiatives that strengthen linkages both within the region and with trading partners outside.

The only long-established regional grouping existing in the Asia-Pacific region is the Association of Southeast Asian Nations (ASEAN). ASEAN was created in response to the combination of internal and external factors that affected social, political and economic stability of the founding countries of ASEAN. In chapter two, I will discuss the formation of ASEAN, its internal and external economic co-operation, and especially its relationship with the EU and the US (in the context of APEC and NAFTA), its main trading partners.

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[63]. This can be seen from the region's export growth slowed in 1993 to about one half of the growth in 1992, partly in response to the economic slowdown outside the region.

Table 2
Summary the Uruguay Round Results in Relation to Developing Countries

Area	Main features	Implications for developing countries
1. Agriculture	Decisions in three areas limit agricultural policies (1) export subsidies reduced (2)domestic supports restrained (3)border measures 'tariffication'	Improved access for agricultural exporters, but (1)concerns over uneven product coverage (sugars, meats) (2)agricultural net importers fear losses from higher prices.
2. Textiles and Apparel	10-year phase-out of MFA with elevated growth rates in quotas, sequential elimination of product coverage, but with temporary selective safeguards.	Potentially major gains to developing countries in area of prominent trade interest, but (1) concern that adjustments in industrial countries concentrated in later years; (2) concern over potential replacement by protective regime (anti-dumping); (3) concerns of many countries they will be uncompetitive against other suppliers, and will lose.
3. Tariffs and Grey Area Measures (VERs)	Tariffs to be cut a comparable percentage to Kennedy and Tokyo Rounds. VER measures to be phased out	Tariff cuts and the elimination of VERs will improve developing country access. But regarding tariff cut, it (1) will likely be small in areas of special developing country interest (textiles and apparel) and (2) tariffs have already been low in most developed countries.
4. TRIMs	Elimination of investment measures affecting trade.	Elimination of trade-related investment requirements. Extension of WTO into investment regulation.
5. Services	Broad principles agreed with sectoral exceptions, and conditionality (MFN). Market access and national treatment embodied, with access commitments tabled	Relatively few specific concession which is more likely to prove the beginning of a process towards liberalisation, rather than substantive liberalisation in its own right.
6. Intellectual Property	Establishment of broad	Many developing

	international minimum standards of protection in the three areas of patents, trademarks, copyright. Disputes to be settled under the integrated dispute settlement body under the World Trade Organisation.	countries had already moved closed to the minimum standards, in part due to prior bilateral pressures.
7. Dispute Settlement	Firm time limits over the stages of the dispute process, and the need for a concerns to reject a panel report strengthening the process	Strengthened procedures in the interest of small countries bringing complaints against larger countries
8. World Trade Organisation (WTO)	New World Trade body established to give permanence to GATT. Two features are that (1) countries acceding to WTO must accept all decisions in the Round as a package (2) acceding countries agree to be bound by an integrated dispute settlement process covering the three areas of goods, services, and investment.	Absence of menu choice in selecting which Uruguay Round decisions to sign on to concerns some countries, as does the integrated dispute process.

Source: Adapted from Table 1., Hamilton, Colleen and Whalley, John (1995).

Chapter 2

The Formation of ASEAN and its External Economic Relations in the Global Context

Introduction

This chapter will discuss the formation of ASEAN, the only long established regional economic organisation in East Asia[1]. The historical background of the formation of ASEAN has shown significant rationale for the establishment of this unique organisation[2] although it has long been criticised for its nature and the "ASEAN Way"[3]. Even the rationale behind the implementation of the "Open Regionalism" of ASEAN now can also be traced back to this historical origin, as well as from the current changing global economic and legal environment that has influenced this new approach. Therefore, it is essential to discuss in some detail, both the history and institutions of ASEAN, as well as the relations between ASEAN and its economic partners in the global context. This will help explain the "ASEAN Uniqueness" that developed along the "ASEAN Way" and further forms the basis of "ASEAN Open Regionalism".

Section 2.1 will focus on ASEAN's historical background, and the complex strands of historical, cultural, political and economic factors shaping the ASEAN way.

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[1] There have now been other regional and sub-regional economic groups such as APEC, EAEC, and the Growth Triangle (see Figure 1) but all of them are either non-binding groups, or are formed as a forum thus there is no formal legal entity or international legal personality.

[2] This is because ASEAN was formed as a very loose organisation without any supranational legal and institutional framework, all decision- and treaty- making power have been concertedly made by the Head of ASEAN countries. ASEAN agreements were enforced at national level while they were committed at regional level. ASEAN uses the "No-Vote" system but relies on the "Musyawarah" principle. All economic co-operation programmes (prior to the new schemes were launched) were implemented mainly on a selective basis not on an across the board approach. ASEAN has been represented by all member states in international forums or organisations, and has been represented as an organisation in addition to the individual ASEAN countries (but the organisation itself has no vote). Despite such inadequacy, ASEAN has remained in existence for over 30 years (unlike other unsuccessful organisations), and has achieved a certain level of success (even though, in the past, not in economic co-operation).

Its institutional structure and functional mechanisms were also influenced by the ASEAN strong sentiment of "Independence, Equality, and Peace"[4]. Therefore, it is not surprised that ASEAN did not create supranational legal and other institutions, and it initially avoided the word "Integration" (Pelkmans, 1997: 199-243). Over years of ASEAN development, both citizens and governments never favoured any kind of formal regional integration, supranationalism, or even regionalisation[5], as they had a fear of imperialism or colonisation and a strong desire to remain independent. Thus, their political will emphasised "Concerted Action" for achieving any common goals of economic co-operation schemes. This strong sentiment was translated into the concept of "Concerted Liberalisation" for a new economic policy in Asian countries, also adopted by APEC[6] in its non-legally binding trade and investment liberalisation[7], and also adopted by ASEAN in the new "Open Regionalism" for its implementation of regionalisation based on "Concerted Liberalisation". This means that ASEAN regionalisation would be implemented by co-ordinated trade and investment liberalisation within the group, then it would be extended to the rest of the world on an NT/MFN basis implemented under the ASEAN new schemes (see chapter 5).

Therefore, ASEAN has implemented the dual objectives of strengthening regional economic self-reliance by concertedly liberalising trade and investment

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[3] For example see Broinowski, Alison (1982), Palmer, Norman D. (1987). Also see Kemapunmanus, Lawan (1985).

[4] This clearly reflects in the Bangkok Declaration, the founding instrument of ASEAN. Also all mechanisms of ASEAN operated the "Rotational Basis". In the early years, ASEAN did not have even a Secretary-General, only a Secretary-General of the ASEAN Secretariat. ASEAN countries sought to have individual ASEAN Secretaries in each individual member country. Only in 1992 was the ASEAN Secretariat given a new status and headed by a single Secretary-General of ASEAN.

[5] The creation of ASEAN as a regional organisation thus, initially was not regarded as a process of regionalisation but rather to create a commitment among member countries for joining hands together in achieving the common goals set forth in the ASEAN Agreements economically and politically.

[6] Although APEC is composed of Asian and Western groups of members, the two have different perspectives, while the Western group prefers a formal institutional infrastructure the Asian group prevails the "Asian Way".

[7] See Bogor Declaration, and for the discussion of the non-legal binding trade and investment liberalisation, see Walter, Andrew W. (1995).

among member countries, and has decided to open its regional market to outsiders without creating a closed economic bloc. ASEAN members remain as independent as they could be under the new form of regionalisation, since it does not require them to render much sovereignty to supranational institutions but rather to employ the ASEAN pattern of network co-operation.

It needs to be made clear here that the discussion in section 2.2 endeavours to explain the rationale for ASEAN in implementing open regionalism from the economic point of view, as ASEAN heavily depends on trade and investment flows into the region. Section 2.2.1 and 2.2.2 thus discuss ASEAN and its relations with the EU, the main trading and investment partner of ASEAN, to show the strong economic and political ties between the two that emphasises the necessity for ASEAN to maintain its external economic links with this group. Section 2.2.3 analyses the EU and ASEAN integration, to clearly distinguish between the EU's institutional integration and ASEAN open regionalism, which is based on the ASEAN pattern of network co-operation.

Also the interdependence between ASEAN, APEC and NAFTA discussed in section 2.2.4 further emphasises ASEAN's policy in developing open regionalism. Moreover, economic integration in ASEAN has relied less on its institutional framework, but rather the economic system and member state policies have been ever more shaped by the structure and dynamics of an increasingly globalised world economy. ASEAN's integration into this global economy has been fuelled by intra-firm and intra- industry trade and investment by the TNC networks established in the region (see chapter 3).

2.1 Historical Background of ASEAN

The Association of Southeast Asian Nations (ASEAN) was established by five founding members, i.e. Indonesia, Malaysia, the Philippines, Singapore and Thailand, when the Foreign Ministers of these countries signed the Bangkok Declaration or ASEAN Declaration on the 8th August 1967 in Bangkok, Thailand. Brunei became the sixth member in 1984[8]. Vietnam joined ASEAN in 1995[9]. Laos and Myanmar (Burma) joined ASEAN in 1997[10], and Cambodia, the tenth member of ASEAN, was admitted in 1999[11]. The aims and purposes of the Association stated in the Bangkok Declaration are to foster regional economic, social, and cultural co-operation and to promote regional peace and stability[12].

The creation of ASEAN is a result of the deep desire of its member states for regional co-operation. ASEAN is a significant achievement after the previous unsuccessful attempts that had been made in this region since the Second World War

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[8]Declaration of the Admission of Brunei Darussalam into the Association of Southeast Asian Nations, Jakarta, 7th January 1984, ASEAN Documents Series 1967-1989, third edition.

[9] Vietnam was admitted as the seventh member of ASEAN on 28th July 1995.

[10] The admission of Laos and Myanmar into ASEAN was held on 23rd July 1997 in Subang Jaya, Malaysia.

[11] ASEAN admitted Cambodia as the tenth member on 30th April 1999, fulfilling its vision to establish an organisation for all Southeast Asian countries.

[12] The aims and purposes of ASEAN provided in the Bangkok Declaration are as follows:

1) To accelerate economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian Nations;
2) To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter;
3) To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields;
4) To provide assistance to each other in the form of training and research facilities in the educational, professional, technical, and administrative spheres;
5) To collaborate more effectively for the greater utilisation of their agriculture and industries, the expansion of their trade, including of the study of the problem of international commodity trade, the improvement of their transportation and communications facilities and the raising of the living standards of their people;
6) To promote Southeast Asian Studies;
7) To maintain close and beneficial co-operation with existing international and regional organisations with similar aims and purposes, and explore all avenues for even closer co-operation among themselves.

to establish and consolidate indigenous regional political and economic institutions. Several organisations had been created before 1967, notably SEATO, ASA, and MAPHILINDO, amidst the political conflicts between some of the member states, and with the threat of the communist aggression shaking regional political stability.

2.1.1 Regional Organisation before 1967 and the Formation of ASEAN

World War II shattered the established colonial pattern in most regions of the world including Southeast Asia. After the decolonisation period, the withdrawal of the colonial powers from the region caused a power vacuum, which might have attracted outsiders to step in for political gain. This was the fear of the countries in this region that prompted them to encourage the idea of working together in a joint effort (Khoman, 1994). At the same time, there were countries outside Southeast Asia, especially major western countries, which inspired and supported the formation of a regional organisation. In the economic field, Southeast Asian nations participated in the UN Economic Commission For Asia and the Far East (ECAFE), and the Colombo Plan. In the military and security field, the Southeast Asia Treaty Organisation (SEATO) and the Anglo-Malayan Defence Agreement were the most significant organisations (Palmer, 1987).

In 1954, SEATO was formed by Australia, France, New Zealand, Pakistan, the Philippines, Thailand, United Kingdom, and the United States. They agreed to protect this region against aggression by way of armed attack, and attempted to establish an anti-Communist regional association. The Southeast Asia Collective Defence Treaty or the Manila Treaty, the founding treaty of SEATO, had two crucial features, one military and one political, concerning security in Southeast Asia. The signatories extended the benefits of the Manila Treaty to Cambodia, Laos, and South Vietnam as the Protocol states.

The Manila Treaty served as the framework for collective defence in this region that allowed the military operations of western countries to spread throughout Southeast Asia, including the entire territories of Asian parties and the general area of South West Pacific (Modelski, 1964). SEATO became the "Pro-American and Pro-Western" alignment in this region. American and western military forces were based widely in Southeast Asia. This caused the countries in this region to feel unhappy with too much interference of western great powers on their soil. Thus finally SEATO died in 1977 even though the Manila Treaty is still in effect.

In April 1955, Indonesia hosted the Afro-Asian Conference, a forum for self-assertion of the newly independent Third World countries in Asia and Africa to a voice in deciding the conduct of world affairs (Palmer, 1994). Up to the early 1960s, the first efforts to achieve institutional forms of regional co-operation were made by indigenous Southeast Asian countries by the formation of two regional groupings: the Association of Southeast Asia (ASA) and MAPHILINDO. They were confined to Southeast Asian states and were created as a regional initiative (Irvine, 1982).

ASA was established in July 1961 by Malaya, the Philippines, and Thailand. However, this organisation remained in existence for only six years because there was a dispute between Malaya and Philippines over North Borneo, which was later renamed Sabah. Sabah became part of the Malaysian Federation in September 1963. ASA was also handicapped by the accusation that it was a pro-western, anti-Communist group whose motivations were primarily political. In fact, ASA's objectives emphasised co-operation in the economic, social, cultural, scientific and administrative fields (Irvine, 1982: 9).

At approximately the same time as this interruption of ASA's activities, the Philippines was developing proposals for a "Greater Malay Confederation" creating an association of the Malay speaking countries comprising Malaysia, the Philippines, and Indonesia. MAPHILINDO came from the first syllables of the name of the three member states. This also had a brief life because of its limited membership and political conflicts between member states. The hostilities were aroused by Indonesia's confrontation with the new Federation of Malaysia from September 1963. This ended the activities of this organisation (Fifield, 1979: 3-6).

In 1966, the Asian and Pacific Council (ASPAC) was formed for economic co-operation. The participants were Australia, Taiwan, Japan, Malaysia, New Zealand, the Philippines, South Korea, South Vietnam, and Thailand. Japan tried to take a leadership role by substituting its aid for the US economic aid to Southeast Asia. The organisation was again perceived to be a front against the expansion of Communism in this region, which was penetrating from Indochina into other countries in Southeast Asia (Palmer, 1994: 28). But ASPAC failed to develop, and lapsed in 1972 when the US ended military involvement in Vietnam, and finally the US withdrew its military bases from Southeast Asia in 1975 (Yoshiyuki, 1994: 37). The inter-state disputes between Malaysia, the Philippines and Indonesia which neutralised ASA and MAPHILINDO, and the political tension which arose with the separation of Singapore from the Malaysia Federation in August 1965, underlined the desirability of regional co-operation among these states (Frank, 1990: 4).

In 1966, with the ending of the September 1965 coup in Indonesia and the termination of "Confrontation", moves were made to renew co-operation attempts in this region. Indonesia normalised relations with Malaysia. At the same time, the Philippines and Malaysia were reconciled, and Singapore and Malaysia also re-

established their relationship. The reconciliation between the four disputants was mediated by Thailand, the only country that was neutral in this region, and Thailand was able to help to re-create the environment of good friendship and the feeling of 'go together hand in hand' in preserving the region.

A new association was required for further co-operation. For this reason, the Foreign Minister of Thailand invited the Foreign Ministers of Indonesia, the Philippines, Singapore and the Deputy Prime Minister of Malaysia to a meeting to set up the new organisation (Khoman, 1994: XVIII). Finally, they signed the Bangkok Declaration establishing ASEAN on 8th August 1967.

2.1.2 Rationale for ASEAN Co-operation

ASEAN was formed in response to a political challenge. The Southeast Asian states faced common external and internal problems. All (except Thailand, which had not been colonised) experienced suffering from the long historical struggles for independence and freedom during the colonial period, and from inter-state conflicts and political tensions[13]. All felt threatened by the regional instability caused by Communist aggression, the Japanese occupation, and the modern western great power domination, especially from the US involvement in Southeast Asia.

This condition underlined the deep desire for regional co-operation in Southeast Asia. Collective self-reliance and regional integrity were crucial in dealing with regional problems. ASEAN states declared that:

> "Member states shall vigorously develop an awareness of regional identity and exert all efforts to create a strong ASEAN community, respected by all and respecting all nations on the basis of mutually advantageous relationships, and in accordance with the principles of self-determination, sovereign equality and non-interference in the internal affairs of nations" [14].

[13] Thailand is also the only country in this region that was neutral and there was no inter-state conflict with its neighbour during that period, so Thailand had an important role in the reconciliation among other states in Southeast Asia.

The formation of ASEAN provided its members with a framework both for maintaining political unity, particularly against external threats, and for acting together to achieve economic advantage for all. The ASEAN member states agreed that economic co-operation not only paved the way for co-operation in other areas but was indeed an essential precondition for the achievement of objectives in various areas in this region. So, firstly they considered that they should:

> "Share a primary responsibility for strengthening the economic and social stability of the region and ensuring their peaceful and progressive national development, and that they are determined to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities in accordance with the ideals and aspirations of their people" [15].

It can be concluded that political motivations and economic objectives are the twin rationales for ASEAN co-operation. The member states of ASEAN all gained experience and learned the lesson from previous unsuccessful organisations, which had the wrong direction and methods of operation. These lessons had strengthened the formation of the new organisation, ASEAN, which has existed for more than 30 years, and has strengthened member countries' relationships in various fields of co-operation.

2.1.3 ASEAN Institutional Structure and its Functions

The institutional structure of ASEAN clearly shows the decentralised nature of ASEAN, especially before the Bali Summit. The main characteristic of ASEAN system is "Concerted Action" through the joint representatives of the Head of ASEAN members for ASEAN, the separate ASEAN National Secretary-General in each ASEAN country, and the "Rotational Basis" adopted in all levels of meetings. This further developed into a pattern of co-ordinated networks, interactive functioning (see charts1, 2, and 3, pp. 115,116,117) and concerted liberalisation that is at the heart of open regionalism.

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[14] Section 8 of the Declaration of ASEAN Concord, Bali, 24th February 1976.

However, the institutional structure of ASEAN has been amended twice[16] since it was established in 1967. Firstly, it was reorganised at the 1976 Bali Summit meeting of ASEAN Heads of Government. Secondly, a restructuring was performed in 1992, the Fourth ASEAN Summit meeting. Both reorganisations took place in response to the improvement and expansion of ASEAN co-operation, in order to streamline the efficient mechanism for implementing its activities.

2.1.3.1 The Organisational Structure of ASEAN before the Bali Summit

The Bangkok Declaration laid down the formal structure (see chart 1, p. 115), specifying in its third section that the highest decision-making body in ASEAN was the Annual Ministerial Meeting, attended by the five foreign Ministers, held on a rotational basis in each of the ASEAN capitals. Its responsibilities were policy formulation, co-ordination of activities, and reviewing of the decisions and proposals of lower-level committees.

In between these Ministerial meetings the ASEAN Standing Committee is responsible for the day-to-day running of all the group's activities. The Committee is comprised of the Foreign Minister of the host country as Chairman, and resident ambassadors of the other ASEAN countries in that host country. The seat of the Standing Committee is the site of the following Ministerial Meeting. The Standing Committee meets several times a year and its annual report is submitted to the meeting of Foreign Ministers for adoption.

Down the line, there were eleven Permanent Committees composed of senior government officials and experts from each country. Their task was to recommend and implement ASEAN programs, both economic and non-economic features, reported

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[15] The Bangkok Declaration, paragraph 6.

through the Standing Committee to the Annual Ministerial Meeting[17]. In addition, there were several special and *ad hoc* committees. The first was the Special Co-ordinating Committee of ASEAN Nations (SCCAN) created in 1972 to co-ordinate links with the European Union and other third countries. In 1975 the Joint Study Group was formed, specially charged with the task of examining the substance and mechanisms of co-operation between ASEAN and the European Union[18].

The other committees were the ASEAN Brussels Committee (ABC), the ASEAN Geneva Committee made up of ASEAN representatives in Brussels and Geneva respectively to handle the external relations of ASEAN, the ASEAN Co-ordinating Committee for the Reconstruction and Rehabilitation of Indochina States (ACCRRIS)[19], the Senior Officials on Sugar, the Special Co-ordinating Committee of ASEAN Central Banks and Monetary Authorities, and the Special Committee on the ASEAN Secretariat[20]. All these committees had specific functions but they did not periodically change their location and chairmanship, as did the other ASEAN bodies. Other semi-permanent and sub-committees as well as working groups were set up from time to time to deal with individual matters as they arose.

An important element of the structure was the ASEAN National Secretariat in each member state, located within the foreign ministries. Their function was to co-

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[16] The reorganisation has not totally changed the machinery of ASEAN, but has streamlined its organisation.

[17] The first four of these committees came into existence in August 1968 and covered Civil Air Transport (first sited in Singapore), Communications Air Transport (sited initially in Malaysia), Food and Agriculture (Indonesia), and shipping (Thailand). By December 1969 five more permanent committees were added to the list. These were Commerce and Industry (Philippines), Finance (Malaysia), Mass Media (Malaysia), Tourism (Indonesia), and Transportation and Telecommunications (Malaysia). In July 1970 a Science and Technology committee was established in Indonesia and in December 1971 one for Social-Cultural Activities was created in Philippines. The sites of these various committees were rotated once every two or three years.

[18] The EU delegation's visit to ASEAN in 1974 led to the emergence of the Joint Study Group in 1975. It comprised officials from both sides but the JSG was not included in the formal institutional structure.

[19] ACCRRIS was formed in February 1973 reflecting an intention to assess the economic requirements of Indochinese states and facilitate ASEAN assistance for reconstruction and rehabilitation.

ordinate national responses to ASEAN requirements, to implement the work of the Association and to service the Annual Ministerial Meeting or other covered ministerial meetings as well as the Standing Committee. The heads of these National Secretariats, Director-Generals, met formally as a group to prepare the agenda for all Standing Committee meetings. This group constituted the pivot of the ASEAN committee system. Another important group of officials, the Senior Officials Meeting (SOM)[21], was established by the ASEAN Ministerial Meeting in November 1971. It was a regular forum for intra-ASEAN political consultation but it was not part of the formal institutional structure of ASEAN.

2.1.3.2 The ASEAN Institutional Structure after the Bali Summit

The 1976 Bali Summit meeting of ASEAN Heads of Government resulted in the acceleration of ASEAN activities. It laid down the framework for ASEAN co-operation in various fields, e.g. political[22], economic[23], social, cultural and informational, and for security, and also improved the mechanisms for ASEAN in order to enhance its effectiveness in implementing its activities.

The major restructuring was in three areas (see Chart 2, p. 116): firstly, the creation of the ASEAN Economic Ministers (AEM) and the other ASEAN Ministers (OAM)[24] in addition to the Foreign Ministers Meeting; secondly, the regrouping of the permanent and *ad hoc* committees into five economic and three non-economic

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[20] This committee was created to look into the establishment of a central Secretariat.

[21] This committee of senior Ministry officials was at the Permanent Secretary level or its equivalent. They initially met regularly over the years to discuss the implementation of the Zone of Peace, Freedom, and Neutrality (ZOPFAN).

[22] Signing of the Treaty of Amity and Co-operation in Southeast Asia, providing the settlement of intra-regional disputes by peaceful means, recognition and respect for the Zone of Peace, Freedom, and Neutrality, strengthening of political solidarity.

[23] Co-operation on basic commodities, food and energy, Industrial co-operation, co-operation in trade, joint approach to international commodities problems and other world economic problems, setting up the machinery for economic co-operation.

[24] ASEAN Ministers of Labour, Social Welfare, Education, Information, Health, Energy, Science and Technology, and Environment.

committees, plus the ASEAN Senior Officials on Drug Matters (ASOD); thirdly, the establishment of an ASEAN Secretariat headed by a Secretary-General sited in Jakarta, Indonesia, which came into existence in June 1976.

The ASEAN Secretariat's role was to monitor, co-ordinate and assist co-operation in ASEAN as well as to foster relations between various ministerial groupings in ASEAN. Reports of the Economic Ministers and their committees were transmitted to the ASEAN Secretariat, which in turn passed them to the ASEAN Standing Committee and the Foreign Ministers' Meeting. It was also responsible for the discharge of all the functions and responsibilities entrusted to it by the ASEAN Ministerial Meeting and the Standing Committee. It facilitated communications with non-ASEAN countries and organisations, conducted research and explained ASEAN co-operation to the outside world.

A Secretary-General was to be appointed by the ASEAN Foreign Ministers on a rotational basis for a two-year term. However, the Secretary-General was not the Secretary-General of ASEAN, or the political spokesman of the association, but only the Secretary-General of the ASEAN Secretariat. He had the authority to address directly the member governments, to ensure that ASEAN committees were informed of current developments in ASEAN activities, and to act as a channel for formal communication between the committees. He could also "harmonise, facilitate and monitor progress in the implementation of all approved ASEAN activities and initiate plans and programs"[25]. Some have criticised the ASEAN Secretariat for having weak functions and have described it as a glorified post office (Chin Kin Wah 1988: XV-

[25] The functions and powers of the Secretary-General were laid down in Article 3 of the Agreement on the Establishment of the ASEAN Secretariat.

XXXV). There were some changes to, and an upgrading of, its functions and powers in 1992.

The ASEAN Economic Ministers (AEM) was given the task of accelerating economic co-operation and this body was considered a part of the formal institutional structure of ASEAN[26]. The AEM was serviced by the Senior Economic Officials Meetings (SEOM). It met about twice a year to review the progress of the various areas of ASEAN economic co-operation and to consider the reports and recommendations concerning various ASEAN economic issues.

Five economic committees were set up and each ASEAN country was assigned to host one of them. The host country designated the chairman, provided the interim technical secretariat and convened the meetings. The five committees and their host countries were as follows:

Host country	Committee
Indonesia	Committee on Food, Agriculture and Forestry (COFAF)
Malaysia	Committee on Transport and Communication (COTAC)
Philippines	Committee on Industry, Minerals, and Energy (COIME)
Singapore	Committee on Trade and Tourism (COTT)
Thailand	Committee on Finance and Banking (COFAB)

The ASEAN Industrial Projects (AIP), industrial joint venture schemes (AIJV) and industrial complementation schemes (AIC) were under the general scope of COIME. Trade liberalisation schemes such as the Preferential Trading Arrangements (PTA) came under COTT. The economic committees reported to the AEM.

[26] Section 5 of the Declaration of ASEAN Concord empowered the AEM to carry out economic co-operation directly. The meeting may be attended by all Ministers in the member countries who are involved in economic matters such as Ministers of Trade, Industry, Finance, Agriculture, Transportation and Communications, and so on.

The non-economic committees were the Committee on Science and Technology (COST), the Committee on Social Development (COSD)[27], and the Committee on Culture and Information (COCI). In addition to the functional committees, there is a Committee on the Budget, which manages and disburses the ASEAN Fund and the budget of the Central ASEAN Secretariat. This committee reports to the Standing Committee.

Turning to the role of the ASEAN private sector, it is very important for implementing various ASEAN economic co-operation programmes, as ASEAN economies are basically private enterprise economies. In order to stimulate the effort and enthusiasm of the private sector in participating in the ASEAN economic co-operation schemes, the ASEAN Chambers of Commerce and Industry (ASEAN-CCI) was formed in 1972 with the support of the ASEAN Foreign Ministers. It is an effective machinery for inter-country private sector interaction and for dialogue with official ASEAN bodies (see Chart 3, p.117), which need to incorporate the views of the private sector in their decision-making. ASEAN-CCI has been actively involved in the formulation of various ASEAN co-operative programs, especially in the areas of trade and industry such as the ASEAN Industrial Complementation (AIC) and ASEAN Industrial Joint Venture (AIJV) schemes.

The annual ASEAN-CCI Meeting rotates around the ASEAN capitals. Its executive body is an ASEAN-CCI Council consisting of two representatives from each country. The President of the ASEAN-CCI has a two-year term. Its subsidiary bodies are structured to match the official ASEAN Committees[28]. The ASEAN-CCI

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[27] The ASEAN Senior Officials on Drug Matters has the main function to discuss and formulate regional policies, approaches and strategies to combat the drug problem. It meets once a year and the co-ordinating work is carried out by the Narcotics Desk Officer at the ASEAN Secretariat.

[28] Since 1976 there has been an established pattern of communication between these official and private sector bodies.

Working Group on Industrial Complementation (WGIC) has organised industry clubs to identify possible avenues for complementation in specific fields. These clubs are the grouping of entrepreneurs from the same manufacturing sector, covering a variety of fields. This relatively (and still) partial ASEAN private sector participation in inter-governmental processes at a regional level may be a weak point in the achievement of more effective economic co-operation in ASEAN (Chng Meng Kng, 1990: 268-82).

2.1.3.3 The Fourth ASEAN Summit Reorganisation 1992

Resulting from the fourth ASEAN Summit Meeting, the organisational machinery of ASEAN was changed in three main areas. Firstly, the Senior Economic Officials Meeting (SEOM), which had previously worked on preparation of ASEAN Economic Meetings, will now supervise the economic plans, as it is an intergovernmental body. Moreover, this body has replaced ASEAN's five economic committees. Secondly, the ASEAN Secretariat was given a new stature; it can *initiate, advise, co-ordinate, recommend, supervise and implement* ASEAN activities[29]. It is now headed by the Secretary-General of ASEAN, replacing and upgrading the office of Secretary-General of the ASEAN Secretariat. The position has been filled by recruitment, instead of the practice of rotation among member states.

Finally, Summit Meetings are to be held on a three-year basis with informal meetings in between[30]. Previously, a Summit Meeting could be scheduled when the member states felt it necessary[31]. Since ASEAN was formed, there had been only four Summit Meetings held in twenty-eight years, namely, 1976, 1977, 1987, and 1992. Since then they have been held in 1995 and 1998, with informal meeting in between. It was hoped that regular meetings of the Heads of Government would help promote

[29] Art. 2 of the Protocol Amending the Agreement on the Establishment of the ASEAN Secretariat which amended Art. 3 of the latter.

more effective in regional co-operation because the meetings will be the main forum for policy- and decision- making. The meeting can also regularly assess the implementation of ASEAN co-operation as well as introducing new co-operation schemes, or strengthening the effectiveness of existing programs in order to achieve the stated goals and objectives of ASEAN.

2.1.4 ASEAN Economic Co-operation

The Bangkok Declaration of 1967, the ASEAN's founding document called for economic co-operation in five areas[32]:

1) Co-operation in Trade and Tourism (COTT);
2) Co-operation in Industry, Minerals and Energy (COIME);
3) Co-operation in Food, Agriculture and Forestry (COFAF);
4) Co-operation in Finance and Banking (COFAB); and
5) Co-operation in Transport and Communications (COTAC).

Economic co-operation is the main objective of ASEAN, however it was not until 1970 that the first Permanent Committees as envisaged in the Bangkok Declaration were organised, and the other Committees dealing with economic matters were set up such as Committees on Food and Agriculture, Civil Air Transportation, Communications and Air Traffic Services, Shipping, Commerce and Industry, Land Transportation and Tourism. In 1971 a wide range of issues were discussed including trade issues such as trade liberalisation, trade fairs and promotion, the harmonisation of statistics and industrial complementation. The ASEAN-CCI (mentioned above) was also organised in this year to encourage the private sector to participate in economic co-operation and to co-operate with the governmental sector.

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[30] Section 8 of Singapore Declaration of 1992.
[31] Section A. 1 of the Declaration of ASEAN Concord, Bali 24th February 1976.
[32] The second paragraph of the Bangkok Declaration provided for general collaboration among ASEAN countries in agriculture, trade, industries, transportation and communication but the five economic committees (COTT, COIME, COFAF, COFAB, and COTAC) were set up later, in 1977, by the ASEAN Economic Ministers Meeting.

During the first ten years of its establishment, ASEAN members put more efforts into improving relations between themselves, regaining their previous cultural and social links and developing a new political consensus, as they had been separated in the past for several centuries during the colonial period[33]. Thus they spent time in conceptualising and organising, and they also had more concerns about regional political problems than economic issues at that time, especially the communist expansion from Indochina into ASEAN. They feared that ASEAN countries might be the next dominoes falling to the Communist World. The political and military conflict in the region no doubt prompted the ASEAN member states to move forward cautiously, and to make political and diplomatic co-operation the main thrust of their attempts to integrate. This was the first phase of ASEAN development.

Nevertheless, the highlight of this first phase was the study on economic co-operation in ASEAN, commissioned by the Foreign Ministers at their 1969 Annual Meeting and conducted by a UN team[34]. The main objective of the study was to identify the possible ways in which co-operative action among the ASEAN countries could make their economies individually and collectively more efficient and more capable of achieving the objective set out in the ASEAN Declaration (United Nations, 1974). The UN report (or, as it was known, "the Kansu Report") was endorsed in principle by the relevant committees. The report became a blueprint for ASEAN economic development strategies and influenced ASEAN economic co-operation

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[33] Mohamad Mahathir, Keynote Address to the First ASEAN Economic Congress, on 13th-22nd March 1987, in Kuala Lumpur, Malaysia.

[34] The Centre for Development Planning, Projections and Policies of the Department of Economic and Social Affairs of the United Nations Secretariat, in co-operation with the Secretariats of the United Nations Economic Commission for Asia and the Far East (ECAFE), the United Nations Conference on Trade and Development (UNCTAD) and the Food and Agriculture Organisation of the United Nations (FAO) set up a team of experts, led by Prof. G. Kansu with Prof. E.A.G. Robinson, working from January 1970 to June 1972.

schemes initiated in the early second phase of ASEAN development during 1976-1978.

The UN team pointed out that special attention should be given to agriculture, industry, trade, transport, and communication. The general techniques of co-operation in trade and industry proposed were selective trade liberalisation[35], industrial complementarity agreements[36] and the so-called 'package deal'. This was an agreement to allocate among the ASEAN countries certain large-scale industrial projects for a specified and limited period of time and to create the conditions, including unidirectional trade liberalisation measures, that would enable them to serve the whole or a large part of the ASEAN market. This would result in large savings in capital and production costs that can be secured by taking advantage of economies of scale. Co-operation in the financing of industrial development, in monetary and balance-of-payments matters, in insurance and reinsurance, and in export credits and export credit insurance were also proposed. Finally the harmonisation of statistics, standards and specifications, co-operation in various forms of training, the pooling of research results, the simplification of trade documentation and a variety of other similar activities were suggestions included in this report.

Economic co-operation within ASEAN really began in 1976 after the Bali Summit, which was held soon after the Economic Ministers Meeting[37]. This AEM

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[35] "Selective trade liberalisation is aimed to increase efficiency and secure a more economic use of resources both in the short run and in the long run by increasing the trade among ASEAN countries and permitting increased specialisation on activities of the greatest advantage, a gradual step-by-step and item-by-item approach was considered appropriate, with a policy of progressive advance towards the long-run goal of a limited free trade area". The UN team Report, p. 2.

[36] This proposal is to encourage the specialisation and the exchange of products or components through unidirectional preferences. The reduction or abolition of intra-regional tariffs, the removal of quantitative restrictions, the establishment of joint ventures and the sharing of markets are the measures for implementing the programmes, which might be beneficial to the ASEAN countries.

[37] Joint Communiqué of the First ASEAN Economic Ministers Meeting held in Jakarta, 26th-27th November 1975. Paragraph 1 stated that this meeting was held to prepare the groundwork for the Bali Summit.

dealt mainly with economic matters, and resulted in the signing of the two crucial ASEAN instruments: the Treaty of Amity and Co-operation in South East Asia and the Declaration of ASEAN Concord by the Heads of Governments of ASEAN states. The Bali Summit formally accepted the recommendations of the UN Report. Many economic co-operation programs[38] were introduced, including the Co-operation on Basic Commodities, particularly food and energy, Industrial Co-operation, Co-operation in Trade, as well as a joint approach to international commodity problems and other world economic problems[39]. The creation of machinery for economic co-operation was also included, and in 1977 an agreement on ASEAN preferential trading arrangements was signed. Subsequently, a number of other measures were also launched to improve economic co-operation within ASEAN.

2.1.5 The Framework for ASEAN Economic Co-operation

The 1976 Declaration of ASEAN Concord provided general frameworks for implementing regional economic co-operation in various programs as follows:

2.1.5.1. ASEAN Industrial Projects (AIPs)

The ASEAN member states have co-operated to establish large-scale ASEAN industrial plants to meet regional requirements for essential commodities. Thus the priority has been given to projects which utilise the materials available in the member states that contribute to the increase of food production, increase foreign exchange earnings or save foreign exchange and create employment[40]. In compliance with this objective[41], the Basic Agreement on ASEAN Industrial Projects was concluded on 6th March 1980. This agreement initially specified the first five ASEAN Industrial

[38] These programs are mainly based on the result of the UN team report.
[39] Declaration of ASEAN Concord, Section B resulting from the Bali Summit in 1976.
[40] Section B 2(i) and (ii) of the Declaration of ASEAN Concord.
[41] Art. 1 of the Basic Agreement on ASEAN Industrial Projects.

Projects[42] so that each member state was to have at least one ASEAN Industrial Project. Each of the five projects had five shareholder entities except for the project established in Thailand, which had seven shareholders according to Thai law. The shareholder entity of the host country had 60% of the total equity of the respective ASEAN Industrial Project, with the balance equally shared by the shareholder entities of the other member states. The equity participation in the shareholder entity was at least one third from the government of the member states, and the rest could be from the private sector in the country and from non-ASEAN interests[43].

The products manufactured by AIPs enjoy zero tariffs when they flow within the ASEAN region, however they are subject to duties on supplies from third countries. In practice, the projects are government owned and managed, and also are monopolies, thus they are not so efficient. ASEAN economists (Ariff and Hill, 1985) feel that AIPs misallocate resources that the private sector could utilise more economically and effectively[44].

2.1.5.2. ASEAN Industrial Complementation (AIC)

The Basic Agreement on ASEAN Industrial Complementation was signed on 18th June 1981. Its main aim was to encourage the private sector to play a major role in most economic activities including industry and trade. The guidelines and frameworks for implementing the ASEAN Industrial Complementation packages (AIC packages) consist of organised complementary trade exchanges of specified processed or manufactured products as agreed among the ASEAN member countries. Production in

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[42] The first five projects were: the ASEAN Urea Projects in Indonesia and Malaysia, the ASEAN Phosphatic fertiliser Project in the Philippines, the ASEAN diesel engine Project in Singapore, and the ASEAN Rock Salt-Soda Ash Project in Thailand. But they were subsequently changed. The fertiliser Projects in Indonesia and Malaysia have been in operation. Singapore changed its project to be a manufacture of Hepatitis B vaccine. Thailand is now developing a potash mine instead of the Rock Salt-Soda Ash project. The Philippines proposed a new project to be a copper purification plant.

[43] Art. 3 of the Basic Agreement on Industrial Projects.

an industrial sector should be allocated between private enterprises in the ASEAN countries in order to avoid unnecessary duplication and to permit economies of scale, for example, in the automotive industry. The individual items such as diesel engines, body panels, universal joints etc. were allocated among entrepreneurs in various ASEAN countries. The governments agreed to reduce the tariffs on such inputs by 50%. The ASEAN Chambers of Commerce and Industry (ASEAN CCI) and the industry clubs play an important role in the implementation of this scheme. However, the process for approval of the scheme was cumbersome because of the ASEAN bureaucratic machinery[45], and in practice all ASEAN members have been promoting their own national car industries in collaboration with various transnational manufacturers.

The industrial complementation in the automotive industry has been supplemented by the Brand to Brand Complementation (BBC) program[46], an agreement on which was signed in October 1988[47]. The BBC scheme is an arrangement whereby specified parts or components of specific vehicle models are traded and used by the brand-owners and brand-related original equipment

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[44] Each AIP project required an investment of US$ 250-300 million.

[45] According to article 1 (3), 2, 3, and 4 of the Basic Agreement on ASEAN Industrial Complementation, an AIC scheme would be recommended by the Committee on Industry, Minerals and Energy (COIME) and approved by the ASEAN Economic Ministers (AEM). The ASEAN-CCI shall identify products for inclusion in any AIC package and the AEM would finally approved such AIC package to enjoy exclusivity privileges.

[46] For instance, the Mitsubishi Corporation has launched a brand-to-brand car parts complementation scheme, under the BBC program, which involves a regional division of labour among Malaysia, Thailand, and the Philippines. In this scheme, Malaysia concentrates on the production of door panels and other stamped parts, Thailand specialises in the manufacture of fuel tanks, consoles, bumpers, and windshields, while the Philippines focuses on the production of transmission parts. See Ariff, Mohamed (1994) "Open Regionalism a la ASEAN". *Journal of Asian Economics.* Vol. 5 No. 1. pp. 99-117. Cited in Athukorala, Prema-Chandra and Menon, Jayant. (1996) "Foreign Direct Investment in ASEAN: Can AFTA Make a Difference?" in *AFTA in the Changing International Economy.* Singapore: Institute of Southeast Asian Studies. p. 81.

[47] This scheme was proposed by the ASEAN Automotive Federation (AAF), one of the industry clubs of the ASEAN-CCI's Working Group on Industrial Complementation.

manufacturers in their respective original equipment products[48]. The BBC products must comply with the rules of origin, which provide that the ASEAN content must be 50% (it was reduced to 35% on a case-by-case basis for a period of five years from 1987 and it was subjected to review after five years)[49]. The other BBC projects included a security paper mill, a magnesium plant and a mini-tractor factory.

2.1.5.3. ASEAN Industrial Joint Venture Scheme (AIJV)

The ASEAN Industrial Joint Venture scheme is aimed at promoting industrial joint venture opportunities and increasing industrial production in the region through resource pooling and market sharing. It was introduced in November 1983. The major feature of the scheme is that investors are free to locate their projects in any participating country to produce accredited AIJV products[50]. The AIJV scheme is much more flexible than the AIC scheme because it requires only two participating countries for an accredited product rather than a sharing of production among all ASEAN member countries. Any product of a joint venture, formed by the participation of nationals from at least two ASEAN countries with minimum equity ownership of 51% and at least 5% equity[51] contribution from nationals of each participating country, could obtain accreditation as an AIJV product under the scheme qualifying for tariff preferences in all of the ASEAN countries.

In order to render the AIJV scheme more flexible, quicker to implement, and more attractive to investors, the Manila Summit held in December 1987 approved a

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[48] Section 1 of the Memorandum of understanding Brand-to-Brand Complementation on the Automotive Industry under the Basic Agreement on ASEAN Industrial Complementation (BAAIC).

[49] Art. V of the Protocol on Improvements on Extension of Tariff Preferential Trading Arrangement, 15th December 1987, resulting from the approval of the Manila Summit as provided in paragraph 23 (d) of the Joint Press Statement Meeting of the ASEAN Heads of Government, Manila, 14th-15th December 1987.

[50] Art. I paragraph 6 of the Revised Basic Agreement on ASEAN Industrial Joint Ventures.

[51] The twenty-fourth meeting of the ASEAN Economic Ministers (AEM) in October 1992 agreed to sign the Second Protocol to amend the revised Basic Agreement on the ASEAN Industrial Joint Venture (BAAIJV), which relaxed the minimum 5% equity requirement.

reduction in the proportion of non-ASEAN participation in AIJVs from 49% to 60%[52], and the deepening of the margin of preference from 75% to 90%.

Since the purpose of the AIJV scheme as well as the AIP and AIC schemes is to provide preferential treatment to AIJV products, it is useful only in a situation in which trade is not free. In other words, trade liberalisation within ASEAN would make the scheme redundant. Thus, the new concept of economic co-operation in ASEAN to enhance general trade liberalisation across the board would supersede that of creating specific programs like AIP, AIC and AIJV, as will be discussed in chapter 5 below.

2.1.5.4. ASEAN Preferential Trading Arrangements (PTA)

The ASEAN preferential trading arrangements were introduced in February 1977. It was considered that the most important steps towards regional market integration in ASEAN, as the UN Report advised, and the most fruitful progress to liberalisation, would be achieved by an item by item approach[53]. Under these arrangements, the member countries were to grant trade preferences to one another on a selective basis. Each ASEAN member country submits its national list of selected products for which it would like the other partner countries to grant it concessions, and its list of commodities for which, in exchange for these concessions, it would be prepared to make concessions to the other countries. To be eligible for tariff preferences in the PTA, products must satisfy the Rules of Origin which stipulated that the total value of the non-ASEAN content must not exceed 50% (later reduced to

[52] This was effective from 1987 up to 31st December 1990 and it was extended to 31st December 1993 upon the EU's (EC) request, resulting from the Ninth EC-ASEAN Ministerial Meeting, Luxembourg, 30th-31st May 1991. It was incorporated in Art. I paragraph 5 of the Revised Basic Agreement on ASEAN Industrial Joint Ventures.

[53] Art. 8 of the Agreement on ASEAN Preferential Trading arrangements concluded on 14th February 1977 in Manila, the Philippines.

35%)[54] of the FOB value of the products, and the final process of manufacture must be performed within the territory of the exporting country.

Initially, therefore, the extension of tariff preferences has been undertaken with member countries voluntarily offering products for inclusion in the PTA, and through negotiation based on a request list of products submitted by member countries for tariff preferences. After 1985, in a move to accelerate the reduction of tariff rates in ASEAN, tariff margin preferences of 20 to 25% were automatically extended across the board on the basis of the import value of the products imported by member countries, subject to an Exclusion List of products that are excluded from tariff preferences under the PTA.

In order to enhance intra-ASEAN trade co-operation and to attract foreign investments, as well as to work towards a significant expansion in intra-ASEAN trade by placing a substantial share of the number and value of the traded items in the PTA, the ASEAN Heads of Government approved measures for achieving this goal by reducing the Exclusion Lists of individual member countries to 10% or less of the number of trade items and achieving a greater harmonisation of the Exclusion Lists. Items remaining in the Exclusion Lists should account for 50% or less of the total value of intra-ASEAN trade. The instruments to be used for granting such preferences were:

> "Long term quantity contracts; purchase finance support at preferential interest rates; preference in procurement by Government entities; extension of tariff preferences; liberalisation of non-tariff measures on a preferential basis; and other measures"[55].

On 15th December 1987 a Memorandum of Understanding on Standstill and Rollback on Non-Tariff Barriers among ASEAN countries was signed, aimed at

[54] Approved by the Manila Summit and provided in Art. V of the Protocol on Improvements on Extension of Tariff Preferences under the ASEAN Preferential Trading Arrangement, December 1987.

effectively reducing non-tariff barriers to trade in the region. This helped to promote trade liberalisation in the region more effectively.

2.1.5.5. Investment Guarantee Agreement

The Agreement for the promotion and Protection of Investments, otherwise known as the Investment Guarantee Agreement (IGA), was promulgated among ASEAN countries in consideration of the following purposes:

> "To stimulate increased flow of technology, know-how and private investment among ASEAN countries, thereby accelerating the industrialisation of the region; 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".

Under the Agreement, the investments of nationals or companies of any member state are not subject to expropriation or nationalisation or any equivalent measure, except for public use, for public purpose, or in the public interest. If so, such expropriation should be under due process of law on a non-discriminatory basis and upon payment of adequate compensation. The compensation should amount to the market value of the investments affected, immediately before the measure of dispossession became public knowledge, and should freely be transferable in freely usable currencies from the host country.

The IGA applies to investments brought into, derived from, or directly connected with the territory of any ASEAN member state by nationals or companies of any other member state and which are specifically approved in writing and registered by the host country.

Regarding the capital and earnings repatriation and subrogation rights, each ASEAN country is obliged, subject to its law, rules and regulations, to allow without unreasonable delay the free transfer, in any freely-usable currency, of the capital, net

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[55] Art. 3 of the Agreement on ASEAN Preferential Trading Arrangements.

profits, dividends, royalties, technical assistance and technical fees, interest and other income, accruing from any investments of the nationals or companies of the other member states. The proceeds from the total or partial liquidation made by nationals or companies of the other member states, and funds in repayment of loans given by nationals or companies of one member state to the nationals or companies of another member state which both states have recognised as investment, are also to be freely transferred.

However, the IGA does not apply to matters of taxation in the territory of the member states. Such matters are governed by the Avoidance of Double Taxation agreements between member states and the domestic laws of each member state. The agreement also provided that any dispute between and among the member states concerning the application of the IGA may be submitted to the ASEAN Economic Ministers for resolution, if the dispute cannot be settled amicably between the parties to the dispute, either party can seek a solution by conciliation or arbitration.

2.1.5.6. ASEAN Financial Co-operation

The main objectives of intra-ASEAN financial co-operation are:

- to facilitate the movement of financial resources within ASEAN;
- to harmonise the rules and regulations relating to customs and other duties affecting intra-ASEAN trade;
- to help eliminate double taxation within ASEAN and to prevent tax avoidance by multi-national corporations with production units and/or offices in more than one ASEAN country;
- to provide facilities for insurance and reinsurance cover for ASEAN customers;
- to provide financial assistance to members to tide over temporary international liquidity problems.

Co-operation in the area of finance involves customs, insurance, taxation and banking matters. In addition to these intra-ASEAN matters, the Committee on Finance and Banking (COFAB) voices ASEAN positions with regard to major international financial issues and co-operates when necessary with third countries on matters of

interest to ASEAN. The Special Committee of ASEAN Central Banks and Monetary Authorities, which was formed in 1972, was the first regional body to be set up for financial co-operation. Its function was to develop a common ASEAN approach to understanding and responding to developments in the international financial arena, and to co-operate in finance matters within the Association. After the Bali Summit of 1976, the COFAB was established. The financial aspects of the various ASEAN investment projects under the AIC, AIP, and AIJV, for example, were looked after largely by the COFAB, which operated through its sub-committees such as the working group on tax matters, and the working group on customs matters.

The ASEAN Banking Council, a private sector body, started operating in June 1981 as an organisation incorporated in Singapore. Its issued capital of S$ 100 billion was composed of stocks owned by banks in the original five countries, with each country owning 20% of total capital. Its financial services within ASEAN included providing finance in the form of equity capital and loans to ASEAN projects under the various ASEAN industrial co-operation schemes. It also lends to ASEAN financial and training institutions. The AFC has also been a channel of investment funds and technology from overseas bodies to ASEAN projects. It is the 'ASEAN arm' of Japanese and EU development financial aid bodies, such as the ASEAN-Japan Development Corporation (AJDC) or INTERACT which is an EU organisation representing development finance institutions of member governments (Srikanta, 1990: 71-3).

ASEAN also launched the ASEAN Swap arrangement in 1977. The arrangement provides for short-term currency swap facilities among members to help tide them over temporary international liquidity problems arising from a balance of payment deficits. Each participant contributed US$ 20 million to the total swap fund

of US$ 100 million, and was entitled to a maximum credit of US$ 40 million for a period of one, two or three months, which may be renewed once for a maximum of another three months. The swap fund was later doubled to US$ 200 million and US$ 80 million respectively[56]. The shared amount of swap fund contributed by each member was increased from US$ 20 million to US$ 40 million[57]. This facility has been used by every member, and it has proved its usefulness as a co-operative arrangement, although the generalised effect of the crisis of 1997-8 overwhelmed the resources available in it.

2.1.5.7. ASEAN Food Security Reserve

ASEAN has recognised the importance of the agricultural sector since its early years even though the ASEAN countries have developed and promoted the industrial sector to bring about structural changes in their economies. Agriculture continues to play an important role in all these economies since it contributes very significantly to the growth and stability of the region, not only in the production of food crops, but also in the provision of employment in the rural areas of the ASEAN economy.

The ASEAN Food Security Reserve was introduced in October 1979 aimed at strengthening food security in the region by noting "the high vulnerability of the region to wide fluctuations in the production of basic foodstuffs and hence to instability of the region's food supply", so it is the common responsibility of the ASEAN member countries to assure food security in this region on the basis of a co-ordinated security plan. The first tangible result of this plan was the setting up of an

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[56] Art. II of the Supplementary Agreement to the Memorandum of understanding on the ASEAN SWAP Arrangement, concluded on 26th September 1978, Washington DC.

[57] Art. III of the Fourth Supplementary Agreement to the Memorandum of understanding on the ASEAN SWAP Arrangement, signed on 21st January 1987, Nepal.

ASEAN emergency rice reserve of 50,000 metric tons[58]. The reserve was increased from time to time with the admission of new members,[59] raising the total amount of the ASEAN Emergency Rice Reserve Stock to 87,000 tons of rice as follows:

Table 1
The ASEAN Emergency Rice Reserve Stock

Country	Reserved Stock (metric tons)
Brunei Darussalam	3,000
Cambodia	3,000
Indonesia	12,000
Laos	3,000
Malaysia	6,000
Myanmar	14,000
Philippines	12,000
Singapore	5,000
Thailand	15,000
Vietnam	14,000
Total	87,000

Source: ASEAN Secretariat, Summary of the ASEAN Food Security Reserve As of 1999

The purpose of the project is to minimise the impact of any temporary supply shortage within the region resulting from various causes such as crop failure. The AFSR agreement also provides for a food information and early warning system for maize, soya beans and sugar, in addition to rice.

The AFSR Board has also been responsible for the Crops Post-Harvest Program (ACPHP), which aims to improve the post-harvest handling of crops and to reduce waste. This included the Grain Post-Harvest Program, which deals with the post-harvest problem of food and feed crops[60]. The ASEAN countries have also had

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[58] Art. 4 of the Agreement on the ASEAN Food Security Reserve concluded on 4th October 1979, New York. The reserve was contributed by Indonesia 12,000 metric tons, Malaysia 6,000 metric tons, the Philippines 12,000 metric tons, Singapore 5,000 metric tons, and Thailand 15,000 metric tons.

[59] Brunei has joined the scheme in 1985 with the contribution of 3,000 metric tons, Vietnam joined the ASEAN in 1995 and Laos and Myanmar were admitted as new members of ASEAN in 1997, and Cambodia was admitted as the lastest Member of ASEAN in 1999, bringing the Emergency Rice Reserve to 87,000 metric tons.

[60] The ASEAN Crops Post-Harvest Program was set up in response to Art. 1 (ii) of the Agreement on the ASEAN Food Security Reserve.

co-operation programmes in fishery and livestock, forestry, eradication of foot and mouth disease, animal disease free zones, plant quarantine rings, and standardisation of import and quarantine regulations on animal and animal products. All these programmes help to promote closer co-operation in the field of agriculture among ASEAN countries on the principle of collective self-reliance, which will contribute to the strengthening of regional economic resilience and stability.

2.1.6 Assessment of the ASEAN Economic Co-operation Programmes

ASEAN economic co-operation has developed through three major phases. The first stage was the first ten years, from 1967 to the first Summit in 1976, during which each ASEAN country basically tried to get to know each other and lay the foundation for co-operation. Regional peace and political stability was the main thrust for ASEAN collaboration at that time. So it inevitably caused a slow and cautious pace in economic co-operation among the ASEAN countries.

The second phase was the subsequent period of 15 years, from 1976 to the fourth Summit of January 1992. There was more active co-operation, a launching of various new economic co-operation schemes, as well as a focus on building institutions for effective co-operation. However, at the beginning of this stage, intra-ASEAN economic co-operation was still not impressive due to various economic factors, which I will discuss below.

The third phase runs from 1992 to 2010, a period of consolidation in the creation of the ASEAN Free Trade Area (AFTA), the ASEAN liberalised trade and investment region, and other forms of regional co-operation characterised by much more active and productive economic co-operation in the region (Naya and Imada, 1992). This has involved the launching of new economic integration programmes include the Framework Agreement on ASEAN Investment Area (AIA), the ASEAN

Framework Agreement on Trade in Services (AFAS), and the ASEAN Framework Agreement on Intellectual Property Co-operation. These new ASEAN schemes have more interactive and complementary implementation that facilitates the ASEAN's move towards deeper regional integration. They also enhance trade and investment interactively (market-based investment and factor-based FDI) in the region, to generate an integrative regional market and production base, which further induces inflows of trade and investment into the region. A detailed analysis of these new schemes is provided in chapter 5.

Initially, in the first and second phases, ASEAN did not have the political will to move towards economic integration, and even economic co-operation was cautiously implemented. Thus, Imada et al. (1991) stated that:

> "ASEAN leaders elected to maintain a marginal rate of integration. In other words, the slowness was essentially by design" (Imada, Montes & Naya, 1991: 1).

There were also many factors that were obstacles to ASEAN economic co-operation in the early stage. They can be assessed as follows:

1) The economic structure of most of the ASEAN countries was competitive rather than complementary. They were predominantly primary producers specialising in the export of food, raw materials and minerals, and whose major markets were in advanced industrial countries.

2) In the early years, although industrial development had progressed significantly since the formation of ASEAN, the ASEAN countries were still inward-looking and concentrated on import substitution. Where export-oriented industries had been established, many of them were again directed towards markets in advanced industrial countries, either in the form of component manufactures such as electronic components, or in finished products such as textiles and garments. The lack of complementarity in economic structure and the need to protect import-replacing industries, were the main obstacles to economic co-operation, as they competed against each other, resulting in conflicts of interest between them.

3) ASEAN members were at different stages of economic development. Singapore was more advanced in technology, industry and commerce, important in entrepôt trade. Brunei was an oil rich country with high GNP per capita. Indonesia, Malaysia and Thailand were intermediate economies with developing industrialisation, while the Philippines was less developed than the other members. The uneven economic development of each ASEAN country in the past has caused them to have difficulties in co-operation.

4) ASEAN member countries have traditionally looked outside their region for their exports, so the growth prospects of their extra-regional markets were usually better than

those of their intra-regional market. Thus it was more difficult to devise measures to encourage intra-regional trade.

5) National, rather than regional, interests dominated ASEAN economic affairs. The conflict between national interests and long-term regional interests was usually resolved in favour of the former, in other words, national interests took precedence over regional interests (Tan, G. 1982). As Young pointed out "this is clearly seen in the negotiations surrounding the ASEAN Industrial Projects and the ASEAN Industrial Complementation schemes" (Young, 1981).

6) The lack of regional investment planning resulted in the inefficient implementation of ASEAN industrial co-operation in various schemes.

Firstly, industrial co-operation schemes did not take into consideration the structure of the industrial sector in the ASEAN countries, especially the under-development of small and medium industries, which generally operated in all ASEAN countries. All the ASEAN industrial schemes were large-scale industries, and they needed high capital investment. This reduced the capital available to improve and co-operate in small and medium industries. They were left out of the scope of co-operation, so only a few large-scale industries co-operated in ASEAN.

Secondly, the schemes placed too much emphasis on market sharing at a time when several ASEAN countries were still reluctant to move towards a free trade area, so co-operation among them was hesitant.

Thirdly, while the industrial co-operation schemes were introduced for co-operation in the pooling of resources, issues such as industrial finance, marketing, and technology were not emphasised and promoted enough to support the industrial schemes. So there was no subordinate function encouraging the industrial co-operation program.

Fourthly, the government-to-government projects of this type were generally difficult to negotiate between all ASEAN countries as they tended to maximise bureaucratic influence, and at the same time state owned projects potentially competed with private sector development in the same industry. However the AIC and AIJV programs have been more complementary to the private sector and they took

advantage of regionalisation as they were initiated and implemented by the private sector. The AIC program itself was private-sector oriented and geared to attract foreign investment, as it could be used as an efficient means of rationalising production in the region and taking advantage of the specific endowments of all ASEAN countries involved.

7) Weaknesses in institutional and procedural frameworks caused delays and ineffectiveness in economic co-operation. The ASEAN projects had to go through unnecessary channels before they were approved, and once approved there was no systematic arrangement for monitoring or providing supportive assistance for those projects. Apart from these problems, the ASEAN economic co-operation agreements usually did not provide detailed frameworks to implement the programmes in order to attain the aims and purposes stated in the agreements.

8) In the past, the economic structures of ASEAN countries were weak, with most of them following an inward-looking economic policy. Thus there were several trade barriers in all ASEAN countries, except Singapore, which has been virtually a free trade port since 1960s. There were tariff barriers such as high tariff rates, fiscal charges, and restrictive licensing as well as other non-tariff barriers. This was because of the competition among themselves for both extra- and intra-ASEAN trade. Regarding investment, they also competed with each other in attracting foreign investment into their countries. There were six separate markets in ASEAN for almost the first two decades since it has been established.

All these negative factors explained the modest growth of intra-ASEAN trade in the first phase (Naya, 1980; Ooi, 1981). However, success in political co-operation among ASEAN countries resulted in the creation of regional peace and political stability, which is one of the factors inducing foreign investment. The boom in investment has been an important factor in the economic growth of all ASEAN countries.

Even though ASEAN formally has neither a conventional collective defence nor a collective security function, but political co-operation was firmly established and successfully achieved. ASEAN was established with regional security against communism very much in mind, however, its founding declaration made no mention of an overt security role. Over time, in practice, the Association has assumed a distinctive, albeit limited, security role based on the medium of political dialogue.

ASEAN succeeded in reducing tension and promoting regional co-operation through informal processes without the implementation of explicit confidence-building measures. It directed attention to well-established practices of consultation and consensus, known in Malay as *Musyawarah*, enhanced by regular high-level visits among ASEAN countries. It has been claimed that this pattern of regular visits has effectively developed into a preventive diplomacy channel.

The evidence that political co-operation among ASEAN member countries has been firmly and successfully achieved is the existence of peace and stability in the region since ASEAN has been established, in contrast to the situation in the pre-ASEAN period when all countries in the region had political conflicts with each other.

ASEAN has overcome its nationalist sentiments and set about dismantling the different barriers to cross-border trade and investments. Most ASEAN countries have implemented trade liberalisation and have significantly reduced tariff rates. They all changed from their inward-looking policy to an outward-looking policy and now employ a market-oriented strategy, an open economy and freer trade, as well as the promotion of industrialisation. The export-oriented policy has been accelerated and has replaced import-substitution and protectionism. This has created a new atmosphere for enhancing both internal and external economic co-operation. Recently, ASEAN countries have diversified their market into differing manufacturing sub-sectors, at a different pace and with a different degree of diversification that has made changes in the industrial structures of the ASEAN economies. Interestingly, ASEAN as a group is considerably more diversified than each individual ASEAN country. This implies some degree of complementarity among the ASEAN countries' manufacturing structures. The apparent divergence in ASEAN countries' comparative advantages

helps confirm the expectations of increasing intra-ASEAN trade opportunities (Pupphavesa, 1991).

2.1.7 Creation of the ASEAN Free Trade Area (AFTA)

Even though limited intra-ASEAN economic co-operation has been achieved in the early stages, it has been successful in political co-operation, promoting peace and stability in the region as well as cultural development and better inter-relationship among the ASEAN members, and has laid a solid foundation and created a favourable environment for the present liberalisation.

In addition to the failure of the industrial co-operation approach, rapid global economic changes and the present interdependent world economy as well as international political diversion after the Cold War were a catalyst for ASEAN to put more effort into advancing its economic co-operation in order to maintain its success in economic performance, to further strengthen itself to cope with changing economic environments, and to shield them from any deterioration or damage caused by external pressure, especially the rising protectionism from other regional trading blocs.

2.1.7.1 Rationale for the Creation of the ASEAN Free Trade Area (AFTA)

The endorsement of the AFTA vision is a very positive development. Large benefits can accrue to member nations from the pooling of resources and the sharing of markets, with dynamic effects reinforcing such benefits.

Both internal and external factors[61] have led to the creation of AFTA. First, the economic evolution within ASEAN countries makes internal economic conditions more appropriate now for the implementation of a free trade area than they were previously. Recent unilateral liberalisation among ASEAN members has harmonised

[61] Section 2 of the Singapore Declaration of 1992 clearly stated that "the profound international political and economic changes that have occurred since the end of the Cold War" were the main

tariff structures to a considerable degree. Consequently, the disparities of tariff structures have been reduced, facilitating further regional integration efforts.

Rapid industrialisation in all ASEAN countries, which took place in the last two decades, has caused the percentage of manufactured exports to increase sharply. This has given rise to a large increase in intra-industry trade in manufactured products in the region, making trade now more complementary than the previous competitiveness among ASEAN countries. Previously ASEAN countries still traded in similar primary products such as agricultural products and basic manufacturing products. They exported to the same markets so that they competed with each other, and intra-ASEAN trade was modest due to the same product lines. Now ASEAN countries have developed their industries and up graded technology to produce more sophisticated products enhanced by the more advanced technology distributed by TNCs located in the region. Therefore with the TNCs network established in the region, intra-firm and intra-industry trade have been actively transacted making now ASEAN trade now more complementary.

Intra-regional trade creation is essential to enhance the development of a trade pattern based on intra-industry specialisation, such as occurred within the EU. Studies have shown that trade creation would outweigh trade diversion for AFTA (Imada, Montes, & Naya, 1991). Regarding investment, ASEAN's attractiveness to investors both from inside and outside ASEAN should be enhanced and it was considered that one way to do so is to create a large single regional market through AFTA.

Second, increasing external pressures push ASEAN countries together economically. The creation of the European Union and the European Economic Area

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reasons for the ASEAN "to move towards a higher plane of political and economic co-operation to secure regional peace and prosperity".

(EEA) made ASEAN fear a 'Fortress Europe'[62]. NAFTA, with the inclusion of Mexico in the U.S-Canada Free Trade Area and possibly other developing countries, especially Chile, in the future, may divert trade and investment away from ASEAN resulting from the proximity of those members of NAFTA.

The emergence of several Asia-Pacific organisations has also pushed ASEAN to seek more cohesion to enhance its effectiveness in Asia-Pacific Economic Co-operation (APEC) and the East Asian Economic Caucus (EAEC), etc. AFTA will be a major step in establishing this internal cohesion so that ASEAN's role as a single bargaining bloc will be enhanced. ASEAN explicitly acknowledged this reason for promoting greater regional economic co-operation in the Singapore Declaration of 1992[63]. ASEAN recognised the importance of APEC and EAEC as it was stated that:

> "With regard to APEC, ASEAN attaches importance to APEC's fundamental objective of sustaining the growth and dynamism of the Asia-Pacific region. With respect to an EAEC, ASEAN recognises that consultations on issues of common concern among East Asian economies, as and when it arises, could contribute to expanding co-operation among the region's economies, and the promotion of an open and free global trading system"[64].

The economic policy change in China to move towards an open economy and outward-looking policy, as well as enhancing export and promoting industrialisation, has been an important factor that ASEAN had to seriously take into consideration. The huge consumer market in China has possibly diverted trade from ASEAN, as China will be a major potential export market of the advanced industrial countries, at the

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[62] The ASEAN countries have declared in the Preamble of the Singapore Declaration that "ASEAN shall constantly seek to safeguard its collective interests in response to the formation of large and powerful economic grouping among the developed countries, in particular through the promotion of an open international economic regime and by stimulating economic co-operation in the region".

[63] It was stated that "ASEAN has made major strides in building co-operative ties with states of the Asia-Pacific region and shall continue to accord them a high priority".

[64] Section 5. Directions in ASEAN Economic Co-operation Singapore Declaration of 1992.

same time China has dramatically increased its exports to ASEAN's traditional markets such as the EU[65].

Apart from an economic point of view, political change in the Socialist countries, especially the collapse of the former Soviet Union and the new dimension of Eastern Europe, were also the main issues challenging the collaboration among ASEAN countries, as the EU has paid more attention to and co-operated more closely with Eastern Europe than earlier. This has caused ASEAN countries to take cognisance of the global political and economic situation in which ASEAN member states have to cope. Thus the ASEAN Free Trade Area involves not only an ordinary regional economic co-operation among ASEAN countries, but also a crucial step for ASEAN in facing the rapid growing economic and political challenges of the 21st century that ASEAN has to put most effort and endeavour to cope with such a challenge. The legal aspects and the implementation of AFTA will be discussed in detail in chapter 5 below.

In addition to the creation of AFTA, ASEAN further launched new liberalisation schemes to cover investment, trade in services, and intellectual property rights (these new ASEAN schemes are analysed in chapter 5). The implementation of these schemes indicates a new direction of ASEAN economic integration that clearly reflects how ASEAN is taking a bold step toward intra-regional liberalisation while make progress in generalised liberalisation. Trade and investment are the main engines to accelerate ASEAN economic growth propelled by its strong external economic relations. Therefore, considering ASEAN's external economic ties, ASEAN strongly requires to maintain its openness. This is fundamental to ASEAN regional economic

[65] In 1993 Chinese exports to the EU were worth 19,538 million ECU and imports from the EU were worth 11,302 million ECU, EUROSTAT, 1994.

policy so that any scepticism about ASEAN's stumbling bloc is unlikely. Now I will discuss ASEAN's main external economic relations in the global context, especially with the European Union, because the two have had long historical relationships both at the national and regional level that still exist to date.

2.2 ASEAN in the Global Context

2.2.1 The Evolution of the Relationship between ASEAN and the European Union

The member countries of ASEAN and of the European Union have had long historical relationships since the colonial period. Southeast Asia's strategic position between two continents (Europe and Asia) and athwart the approaches to the Indian and Pacific oceans is of major importance. It lies across the main sea (and presently air) routes between both Oceans. In this respect the strategic significance of centres of communication such as Singapore, Bangkok, Manila and Saigon scarcely needs emphasis. It also has strategic importance to Australia and New Zealand. As Southeast Asia's position is on an important trade route, Singapore has been a world's great entrepôt port and free trade port for a long time.

Apart from its importance as a strategic position, Southeast Asia is rich in natural resources, and has an impressive potential as a source of food for Asia itself and for the colonial masters at that time. The Federation of Malaya (Malaysia including Singapore and Sarawak) and Brunei were colonies of the United Kingdom, which still has a considerable direct territorial interest in the area covered by the Southeast Asia Collective Defence Treaty (Chatham House Study Group, 1958) on the mainland and immediately adjacent to it are Malaysia, Singapore, Borneo, Brunei, Sarawak and Labuan, even though those territories are now independent.

British possession of these territories was originally brought about by the necessity to secure and to keep open the eastern end of the great trade route across the world from Britain to India and thence to China and Japan. The basic links in this chain at this point were not the hinterland territories, especially Malaya, which were subsequently developed along the route, but the great entrepôt port and naval bases of Singapore and Hong Kong.

Undoubtedly, British trade relations with its former colonies have been laid down since the colonial period, and not only trade and investment but also the foundation of the legal, political, social, cultural as well as the educational systems have been based on the British system. In particular, many British companies have been established and have invested considerably throughout the region and many of them have maintained their business in this area up to now.

The Netherlands had colonised and dominated Indonesia for more than three centuries and certainly it laid down fundamental social, cultural, political and commercial fundamental structures in this country as well. The Netherlands and Indonesia still have trade and commercial links as well as other forms of co-operation between them. While the Philippines had belonged to Spain for 350 years and then to the United States before being conquered by Japan, Spanish influence inevitably remained in the Philippines. Even though Thailand is the only independent country in this region it had been surrounded by European colonies. Thailand's location was on the British trade route channelling from India, and Burma through Thailand to the Federation of Malaya, and downward to Indonesia and the Philippines. So all Southeast Asian countries have had close trade and other relationships with these European countries.

During the colonial period, foreign investment was channelled to plantation agriculture, to mining in Malaya and Indonesia and to the service sector in Singapore. For the industrialisation programme in the post-independence period, the region has again relied on foreign direct investment, but this time through multi-national corporations who have used the region as an offshore platform for their global production networks. Again the United Kingdom is the most important source of investment from Europe in this region. This is because the British base companies, both in commercial and industrial sectors, have been scattered throughout the region for a long time.

This bilateral level of close relationships between the ASEAN member countries and some of the member countries of the European Union naturally induced inter-regional relations between the EU and ASEAN, especially after ASEAN was founded and the two regional groupings had formally signed a Co-operation Agreement in 1980. When ASEAN was established in 1967, the EU recognised and acknowledged the existence of ASEAN, and they have had an informal relationships although no concrete contacts developed until 1972, when the Special Co-ordinating Committee of ASEAN Nations (SCCAN) was established to initiate regular contact and to formulate negotiating postures as well as to undertake negotiations with the EU. This was due to Britain's accession to the EC, resulting in the loss of the Commonwealth trade preference for Malaysia and Singapore. At that time the United Kingdom was concerned about this issue and sought a solution by concluding bilateral commercial co-operation agreements with the countries affected by the enlargement of the EC. ASEAN was sounded out about this solution but preferred to develop its relations with the EC at a regional level as ASEAN developed institutionally. ASEAN

did not wish to conclude commercial co-operation agreements similar to those being signed by individual countries in the Indian subcontinent[66].

In 1974, an EC delegation visited the ASEAN region leading to the emergence of the Joint Study Group (JSG) of officials from both sides in 1975. It was charged with the task of examining the substance and mechanism of co-operation between the two regional organisations. This group has met regularly commencing in June 1975, dealing with trade co-operation. However, progress was limited, so ASEAN, which was aware of the need for contacts at a political level with the EC, pressed for a meeting with the ambassadors of the ASEAN countries in Brussels. Thus the ASEAN Brussels Committee was created and the Committee of Permanent Representatives of the EC countries was also founded. These meetings led to the first EC/ASEAN Ministerial Meeting, in Brussels on 21st November 1978, which agreed to establish "a dialogue"[67] at the Ambassadorial level between Permanent Representatives of the Member States to the European Communities, the Commission of the European Communities, and the ASEAN Ambassadors to the Communities. It also provided a crucial framework for co-operation in various fields, especially in trade, commodities, investment, transfer of technology, training programmes and scientific co-operation and development co-operation. The Joint Declaration of the ASEAN-EC Ministerial

[66] India and Pakistan established diplomatic relations with the EC some 30 years ago, when the U.K. first applied to join the EC, in order to safeguard their exports to the British market. In 1973 India concluded a non-preferential trade co-operation agreement with the enlarged Community, which entered into similar agreements with China, Pakistan, Sri Lanka and Bangladesh. But at that time ASEAN preferred to concluded intra-regional agreement instead of the similar bilateral co-operation agreements as such and this was the good first step for furthering their co-operation at the regional level.

[67] At the present, ASEAN maintains Dialogue-relations with the European Union (since 1972), Australia (1974), New Zealand (1975), Japan (1977), Canada (1977), United States (1977) and the United Nations Development Program (UNDP) (since 1977). The UNDP is a major multilateral agency for funding technical assistance to ASEAN. The ASEAN dialogue partner-relations arrangements with external powers have become a useful mechanism for co-ordinating ASEAN's common position on various issues that are primarily economic in nature as well as other dealings by ASEAN with these countries. ASEAN has benefited tremendously from their special relations with the dialogue countries who are ASEAN major trading partners in the world.

Meeting also encompassed international relations and regional integration and co-operation as well as cultural co-operation. The Framework of co-operation was designed such that:

> "The Communities recognised that ASEAN is a developing region and agreed that co-operation between ASEAN and the Communities should be expanded in such manner as to contribute to ASEAN's efforts in enhancing its self-reliance and economic resilience".

This led to the conclusion of the ASEAN-EC Co-operation Agreement of 1980 [68]. However, there was no privilege clause applied in trade relations between ASEAN and the EU other than Most-Favoured-Nation Treatment, which is in accordance with the provisions of GATT. On the commercial side ASEAN and EC agreed to develop, expand and diversify their two-way trade to the fullest extent possible and the ASEAN Trade Promotion Centre was established in the Communities. In order to facilitate economic co-operation between the two groups, the EEC-ASEAN Business Council was also created. This Council provides a framework for establishing and fostering contacts and deepening mutual knowledge between the private economic operators. This helps promote and encourage the participation of the private sector of both sides in economic co-operation. Art. 5 of the ASEAN-EC Co-operation Agreement set up a Joint Co-operation Committee, which regularly meets once a year to facilitate the implementation and to further the general aims of the agreement.

Since the signing of the ASEAN-EEC Co-operation Agreement in 1980, commercial, economic and development co-operation between ASEAN and the EU has made significant progress. Both groups are outward-looking, GATT-consistent and supportive of the process of trade liberalisation (the EC moved to a single market and ASEAN to a Free Trade Area). However, ASEAN has had to put great efforts into

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[68] The Agreement was signed at the second EC/ASEAN Ministerial Meeting held in Kuala Lumpur on 7th March 1980.

lobbying and urging the EU to accord more priority to ASEAN along the evolution of this intra-regional relation before reaching the current situation in which the EU has recently begun to change its strategy in dealing with ASEAN.

The issue of investment protection arrangements has been discussed between the EU and ASEAN since the early stage of their co-operation. Almost the member states of the European Union have now concluded with ASEAN countries specific agreements on the mutual promotion and protection of investments (see lists of BITs concluded between the EU and ASEAN countries in chapter 4). Such agreements contain provisions aimed at protecting and thereby stimulating investment. Among other things they provide for non-discriminatory legal or administrative treatment, for protection against arbitrary expropriation, and above all for adequate, prompt and freely transferable compensation in the event of nationalisation and for the settlement of disputes by a neutral arbitration body. Some parties have concluded such investment protection agreements since the early sixties but some of them have signed the agreements recently[69]. Another key provision of the agreements is the requirement that each contracting party should accord investments, nationals and companies of the other party both national and MFN treatment. However, these contain a specific derogation from these two principles to exclude from non-discriminatory treatment the privileges accorded by a party to nationals of third states as a result of its participation in a regional economic group, i.e. a common or single market. Regarding the commodity issue, ASEAN urged the EU in the ASEAN-EU Ministerial Meeting several times[70] to guarantee within the global context the stabilisation of the export

[69] Commission of European Communities "Protecting and Guaranteeing Private Investments: EEC and ASEAN" Brussels: the European Union.

[70] The issue was raised in the ASEAN-EC Ministerial Meeting in Brussels in 1978, in Bangkok in 1983, and ASEAN also urged the EU to consider the commodities issues in all meeting between them, especially in 1981, 1983, 1984 and 1986.

earning of ASEAN countries as well as other developing countries. Because the developing countries were affected by balance of payments problems, falling commodity prices, the burden of debt and protectionist pressures in the 1980s, so ASEAN reiterated to the EU the need to maintain an open trading system and to improve market access further. However, the EU noted ASEAN's interest but did not respond to ASEAN's needs, especially in stabilising export earnings of agricultural products that had previously been the most important export product of ASEAN countries. The instability of prices of primary products in world markets deteriorated ASEAN member states' economies, which made ASEAN countries review their economic policy and promote industrialisation since the 1980s.

ASEAN also asked the EU to join the International Natural Rubber Agreement, which was finally agreed by the EU. The Ministers of both sides reiterated their commitment to closer co-operation necessary for achieving the objective of the integrated Program for Commodities (IPC)[71], in particular, the establishment of individual commodity agreements. The need to put the Agreement on the Common Fund into operation[72] has been reiterated but this has been postponed since 1980. ASEAN Ministers also urged the EU to sign and ratify the 6th International Tin Agreement, and to participate in the International Sugar Agreement. At that time the EC was reluctant to immediately tie itself to those agreements.

In the fourth ASEAN-EC Meeting the Ministers agreed on the urgency of stabilising the international sugar market by adopting appropriate policies within the

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[71] The integrated Program for Commodities (IPC) and the establishment of the Common Fund have been firstly emphasised in the ASEAN-EC Ministerial Meeting in Brussels in 1978 and the issues were reiterated after that several times.

[72] The Common Fund is one element of the UNCTAD Integrated Program proposed as the principal solution to commodity problem. The Common Fund was established to facilitate the financing of buffer stock operations which is to be instituted on the presumption that purchases and sales of centrally managed stockpiles of commodities would help mitigate the amplitude of price fluctuations with the

framework of a new International Sugar Agreement. And in the fifth ASEAN-EC Meeting, the Ministers stressed the importance of the establishment of the International Tropical Timber Organisation, and also urged the major producing and consuming countries to become parties to the re-negotiated International Cocoa Agreement.

In 1988 ASEAN emphasised the importance of vegetable oils and fats products for the development of their economies, and stressed the need for further expansion of their exports to the world market, especially the EU. Both sides agreed to continue to enhance co-operation in various International Commodity Agreements and Arrangements to address commodity related problems, in particular price instability, and in this context they underscored the importance of continued co-operation towards more effective operation of the Common Fund. Nevertheless, at that time, the EU (EC) had not yet taken serious steps in seeking solutions concerning the commodity issue as the ASEAN side had urged them.

Regarding co-operation between ASEAN and the EU on investment, the EU reiterated its support for ASEAN Industrial Co-operation and agreed to encourage further and to assist financial institutions in the EU members such as the Grouping of the Community's Public Development Finance Institutions (INTERACT)[73] and the European Investment Bank (EIB) in securing funds for ASEAN Industrial Projects. The European Council of Ministers agreed to extend this on a case-by-case basis, and initially allocated a total of 250 million ECU a year over a three-year period by establishing various specialised JCC sub-committees to propose suitable programmes

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declared objective of stabilising certain key commodity prices at levels "remunerative to producers and fair to consumers".

[73] The Community agreed to act as a catalyst in the financing of large scale ASEAN Industrial Projects through the Community's Public Development Finance Corporation known as INTERACT. This was

in the priority sectors. ASEAN and the EU also created a Joint Investment Committee in each ASEAN country[74] to facilitate and explore avenues for closer investment co-operation between the EU and ASEAN investors. They encouraged the ASEAN-EU (EC) Business Council, which was established in 1981 as a result of the agreement reached at the Meeting between the ASEAN Ministers and the Commission of the European Community. The ASEAN-EU Business Council aims to enhance the participation of the private sector in strengthening their contacts for promoting mutually beneficial investment in the ASEAN region[75].

At the ninth EC-ASEAN Ministerial Meeting held in Luxembourg, on 30th-31st May 1991, both sides reaffirmed that industrial development and investment should be accorded high priority in EC-ASEAN relations, as they would be the thrust of economic co-operation between the two groupings for the future. This was a turning point from the previous relationship between ASEAN and the EU, which generally involved lip service rather than actual implementation in the early years of their co-operation (Harris and Bridges, 1983).

The ministers thus agreed to prolong and improving the EC International Investment Partners (EC-IIP) Scheme, which was established in 1989 in order to realise more ASEAN-EU joint venture projects, and it completed a three-year experimental phase in 1991. As this scheme had met wide acceptance in the ASEAN region, it was extended to finance over 100 potential joint ventures between

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adopted in the First ASEAN-EC Joint Co-operation Committee Meeting on 28th-29th November 1980 in Manila, the Philippines.

[74] The Ministers reiterated in the sixth ASEAN-EC Ministerial Meeting that it is very important to set the Joint High Level Working Party on Investment to facilitate the EC investment in ASEAN as the European investment has been increased in this region and the Joint Investment Committee should be created in order to constitute a valuable means of pursuing the objectives as stated by the Joint High Level Working Party on Investment.

[75] In the Sixth Meeting of the ASEAN-EC Joint Co-operation Committee held in Brussels on 20th-21st March 1986, the ASEAN and EC recognised the importance of the EC/ASEAN Business Council in

companies in the EU and ASEAN and it increased the resources for each EC-IIP project to 1 million ECU. The EU committed itself to assisting in the organisation of investment missions to ASEAN to facilitate this program. Besides, the ministers recommended the establishment of a European Information Centre in each ASEAN country that would further strengthen industrial and investment co-operation between ASEAN and the EU.

Another new step in promoting private sector participation in the ASEAN-EU industrial co-operation programme, which was adopted by the ministers, was the following:

- for both sides to consult with their own private sectors directly;
- for private sectors of both regions to find effective ways for joint consultations;
- to involve the private sectors of both sides in EC-ASEAN programs[76].

These have been effective avenues for encouraging the private sector of both sides to co-operate directly in the field of industrial co-operation, which was previously very limited in practice.

The shift in ASEAN exports towards industrial products with higher added value was so remarkable, and ministers shared the view that joint efforts by the EU and ASEAN to maintain this position development should made through improved market access, trade and investment promotion and effective technology transfer. The EU and ASEAN agreed that the EU GSP scheme was an important tool by which ASEAN's exports to the EU could be diversified and increased. So the ASEAN ministers urged the EU to revise the GSP Scheme in order to make it simpler and more transparent. They also asked the EU to take into account ASEAN interests *inter*

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bringing together representatives of the business community of the two regions in supporting the activities under the Co-operation Agreement.

[76] Section 43, Economic and development co-operation agreed in the Joint Declaration, the Ninth EC-ASEAN Ministerial Meeting, Luxembourg, 30th-31st May 1991.

alia the inclusion of the donor country content. This time the EU took improving the GSP scheme more seriously than before[77], which can be seen from the revised GSP Scheme proposed by the Commission to the Council and the European Parliament for GSP 1995-2004[78]. However, the EU has applied cumulative rules of origin to the ASEAN region since 1985 resulting from the ASEAN-EC Ministerial Meeting on Economic matters in Bangkok, Thailand between 17th-18th October 1985.

At the tenth Ministerial Meeting in 1992, following the treaty agreed at Maastricht to establish a European Union, the major steps towards completion of the Single Market and prospects for enlargement of the Community, the EU and ASEAN clearly expressed the policy of two-way trade and the improvement of access to the EU's market to maintain ASEAN's high rates of growth. They agreed to jointly improve access and enhance rapid information networks linking business operators in the two regions through the establishment of business information centres and networks of European Chambers of Commerce in ASEAN. The EU adopted motions to provide more systematic information on the Single European Market with a view to assist ASEAN in adjusting to changes and market opportunities arising therefrom. These new steps, moving towards closer economic relations between the two, initiated by the EU as it admitted that "the EC had not kept pace with the post-1988 investment boom in ASEAN"[79]. So the EU emphasised the need to accord high priority to ASEAN-EU relations and stated that it was becoming more urgent to especially promote direct investment in the ASEAN region.

The EU underlined the importance of the decision of the fourth ASEAN Summit of 1992 to establish the ASEAN Free Trade Area as a strengthening of an

[77] In the past, the EU just applied the basic principles underlying the GSP to ASEAN and ASEAN countries were ranked very low hierarchy under the EU's GSP Scheme.

open multilateral trading system which would further expand trade and investment flows between the two regions. The European Community offered to share its experiences from the European economic integration process and to provide technical assistance to strengthen the institutional capacity of the ASEAN Secretariat. The EU and ASEAN agreed to enhance consultation in trade matters through better use of the ASEAN-EU Trade Experts Meeting (TEM) which would meet at the request of either side. They also established a Partner Research Network to facilitate research based business co-operation and joint ventures. This helped to promote technology transfer, and in the initial stage, both sides commended the establishment of a 7.5 million ECU ASEAN-EU Patents and Trademarks Program to realise the implementation of protection of intellectual property rights.

Apart from economic co-operation between ASEAN and the EU, there have been various fields of co-operation between them, especially in political issues. Both sides devoted a large part of the time to discussions about political problems in Indochina: Cambodia, Laos and Vietnam. They strongly condemned the military invasion by Vietnam of Cambodian territory. Moreover, ASEAN and the EU were seriously concerned with the 'Boat People' problem. The flood of Vietnamese refugees into the ASEAN countries challenged the morality and political policies of these countries and it has been a great burden for them. Europe tried to assist in providing food, money and facilities to the refugee camps along the border of Thailand, as well as to accept some of those refugees seeking asylum in third countries.

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[78] COM (94) 212 final.
[79] Joint Declaration Tenth ASEAN-EC Ministerial Meeting, Manila, the Philippines, 1992.

The Fourth Ministerial Meeting in 1983 was the first time that ASEAN and the EU jointly urged speedy progress towards a Middle East peace settlement. They also discussed the problem of Afghanistan. They took the view that the crisis could be overcome constructively through the emergence of a neutral, non-aligned Afghanistan, outside competition among the power. In their political concerns, ASEAN and the EU generally have the same standpoint and the EU has always supported ASEAN, especially in the United Nations.

Complementary with government-level contacts, various other forms of contact have been developed. Under EU auspices, private sector and academic conferences have been organised and contacts between Euro-MPs and ASEAN MPs have gradually been established on a regular basis. There have been meetings between delegations from the European Parliament and the ASEAN Inter-Parliamentary Organisation that have brought closer relationships between the two groups' politicians.

In 1979 the European Community established a representative office in Bangkok to facilitate co-operation between ASEAN and the EU[80]. Presently, there are EU Delegation Offices in all ASEAN member countries to help promote closer of networks relations between the two groups.

Regarding agricultural co-operation, the EU helped to finance a feasibility study for ASEAN Post-Harvest Grain Research, and training Program aid on ASEAN Timber Industry Research. The Development and Training Centre was established for this purpose. This program has been implemented fruitfully in ASEAN countries.

ASEAN and the EU also have had closer co-operation on drug control and prevention efforts in the implementation of a programmes under the Comprehensive

Multidisciplinary Outline (CMO) for future Activities in Combating Drug Abuse and the UN Global Program of Action Against Drug Abuse. They agreed that the European Plan against Drugs, approved in December 1990, constitutes an important contribution to the implementation of that internationally concerted strategy. The measures taken in 1990 by the EU to control and regulate the trade in chemicals, in accordance with the 1988 UN Convention, as well as its intention to take comparable measures against money laundering, has been welcomed by both sides. The guidelines in the field of money laundering, which have been defined by the International Financial Action Task Force, have also been observed. Finally, the ASEAN-EU Projects in the areas of drug prevention, detection, treatment and rehabilitation have been seriously implemented.

The main change in ASEAN-EU co-operation since the 1990s is a crucial step taken towards a new dimension of closer economic co-operation in an era of a rapidly changing world economy.

Chronology of the ASEAN-EU (EEC) Relationship

1972	Establishment of Special Co-ordinating Committee of ASEAN Nations (SCANN).
1975	Establishment of Joint Study Group (JSG).
1978	First ASEAN-EEC Ministerial Meeting.
1980	Second ASEAN-EEC Ministerial Meeting: ASEAN-EEC Co-operation Agreement.
1985	Establishment of ASEAN-EEC Ministerial Meeting on Economic Matters: 5-year extension of the Co-operation Agreement.
1986	Report of High Level Working Party (HLWP) to 6th ASEAN-EEC Ministerial Meeting.
1987	Third ASEAN Summit in Manila.
1989	2-year Extension of ASEAN-EEC Co-operation Agreement.
1992	Fourth ASEAN Summit in Singapore: AFTA Agreement.
1996	Asia-Europe Summit Meeting.

2.2.2 A New Era of the ASEAN/EU Relations

2.2.2.1 The EU and ASEAN: Dynamic Groups in the World Economy

[80] Joint Declaration of the ASEAN-EC Ministerial Meeting, Brussels, 21st November 1978.

Since the 1960s economic growth in East and Southeast Asia has been steadily rising, and especially in the 1990s their economic growth rates have dramatically increased up to the 1997 Asian crisis. ASEAN countries had been among those achieving the fastest economic growth of the world. Thus Asian regional developments inevitably affected EU-ASEAN relations. The EU, as one of the most important trading partners of ASEAN, was very concerned about the dynamic economic change in this region, and set new strategies in dealing with ASEAN and other Asian countries. They had shown the need for a greater European Union presence in the region and closer economic ties. The EU therefore introduced a number of policy changes in its relationship with ASEAN[81]. This is hoped to have a positive impact on trade and investment between the EU and ASEAN in the future.

The Commission of the European Union submitted a communication to the Council, which stated that:

> "The rise of Asia is dramatically changing the world balance of economic power. By the year 2000, the World Bank estimates that half the growth in the economy will come from East and Southeast Asia alone. This growth will ensure that by the year 2000 one billion Asians will have significant consumer spending power and of these, 400 million will have average disposable incomes as high, if not higher, than their European or US contemporaries. The European Union needs therefore to accord Asia a higher priority than is at present the case. **The European Union needs as a matter of urgency to strengthen its economic presence in Asia in order to maintain its leading role in the world economy.** The establishment of a strong, co-ordinated presence in Asia will allow Europe at the beginning of the XXIst century to ensure that its interests are taken fully into account there" [82].

This meant that the EU would take a new position in this region and employ new strategies in dealing with Asian countries, especially with ASEAN, which not only has become the EU's main trading partner[83] but also is a vital key to Europe's weight in

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[81] Commission of the European Union, Europe Information No. 127/ X / 91, 1994. Brussels.

[82] Communication from the Commission to the Council, "Towards a new ASIA Strategy". Commission of the European Union, Directorate-General for Information, Brussels, 1994.

[83] EUROSTAT, External Trade Statistic yearbook, 1994: ASEAN: only 6 countries exported 28,785 million ECU to EU while importing 26,230 million ECU from the EU. They were ranked among the top 50 main trading partners of the EU.

whole Pacific Rim region, as well as to the success of EU industry in penetrating the Japanese marketplace and to balance the US economic role in Asia.

2.2.2.2 ASEAN and the EU's Economic Prospects

As mentioned in chapter 1, economic growth in East and Southeast Asia had been impressive, higher than any other regions of the world[84] (see Tables 2 and 3, p. 120), before the Asian crisis. Despite the 1997 Asian crisis, the region still has great economic potential, especially once it recovers from stagnation.

On the other hand the European Union has become the biggest trading bloc in the world. In 1990 EU merchandise trade accounted for 20.7% of world trade[85], compared to 16.8% for the United States and 9.7% for Japan. In the same year, the EU accounted for 27.1% of world trade in commercial services, ahead of the United States of America (16.1%) and Japan (10.2%)[86]. Trade and investment made and received by this Union are very significant in the world economy. Thus, if the European Union and ASEAN, two regional groupings which have very high economic potential and prospects, have close economic co-operation and strengthen their ties in trade and investment, both regions will reinforce their economic growth based on mutual interest.

2.2.2.3 Why is the European Union interested in ASEAN?

The ASEAN region now has a total population of about 500 million, a total area of 4.5 million kilometres, a combined gross national product of US$ 685 billion and a total trade of US$ 720 billion, which represents both a large consumer market

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[84] The World Bank Annual Report (1994b), p.88, and also see World Bank. (1993a). The East Asian Miracle: Economic Growth and Public Policy. A World Bank Policy Research Report. New York: Oxford University Press.

[85] This percentage excludes intra-EU trade. If one includes intra-EU trade in the value of both Union and total world trade, the share of the EU rises to 39.3%.

and a ready supply of relatively low labour cost[87]. It also brings together an abundant source of natural resources[88].

Besides its richness in natural resources and agricultural products, ASEAN is making fast progress in producing manufactured goods. It has become a main exporter of manufactured goods among the leading developing countries. In the past decade ASEAN has much improved its industrial sector and has developed its infrastructure as well as other factors for implementing the promotion of industrialisation. Rapid economic development in ASEAN has been accompanied by a transformation of economic structures. Manufactured goods now represent more than 70% of all exports by the ASEAN countries. As a percentage of total merchandise exports, manufactured goods jumped from 2.5% in 1980 to 35% in 1990 in Indonesia; from 18.5% to 53.5% in Malaysia; from 25% to 63% in Thailand[89]. Some ASEAN countries are ranked among the top 25 exporters at the global level, while ASEAN as a group was ranked fourth of the world's top traders. They also are ranked among the world's twenty-fifth top traders in commercial services[90].

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[86] The Directorate-General for Economic and Finance Affairs and The Directorate-General for External Relations (1993) *The European Community as a World Trade Partner: The Second Report.* Brussels: The European Commission.

[87] See ASEANWEB http://www.aseansec.org/history/asn_his2.htm.

[88] World of Information, Asia and Pacific Review, 1986. ASEAN is rich in natural resources and agricultural products. For example Brunei's main minerals are oil and natural gas. Indonesia is a major producer of tin and nickel ores. It also has reserves of coal estimated at 21 billion tons and that of oil at 9.6 billion barrels. It has two very large fields of natural gas and potentially large offshore supplies have also been discovered. Malaysia has an estimated 2500-4000 million barrel oil reserve and 79 trillion cubic feet of natural gas reserves. It is the world's largest producer of tin. The Philippines is one of the largest producer of copper, with estimated reserves of 1,030 million tons. Thailand is the world's second largest producer of tin and precious stones, especially sapphires. The region is also rich in agriculture cash crops and forestry products. Indonesia is the second largest producer of natural rubber and its other major products are timber, particularly tropical hardwood, coconut and palm oil, tea and coffee. Malaysia is the largest producer of natural rubber, accounting for nearly 40% of the total world output. In the Philippines the main cash crops include coconut, sugarcane, hemp, bananas, coffee, tobacco, and peanuts. Thailand is one of the largest rice exporters. Sugar, tapioca, rubber, kenaf, cotton, jute, tobacco, pineapples, oilseeds and coffee are also important commercial crops.

[89] Source: GATT, International Trade 1990-91, also see Asia's Economies: Outlooks to the Year 2000, NRI Quarterly, Autumn 1993.

[90] Asia's Economies: Outlooks to the Year 2000, NRI Quarterly, Autumn 1993.

It can be justified from a political economy point of view that the economic strength and future prospects of ASEAN one among the most attractive points to the EU among other reasons, which we will discuss further below. Firstly, we will look into the macroeconomics of ASEAN and its economic environment that induces trade and investment into this region. Also the formation of ASEAN has contributed to the political and economic stability of its member countries, thereby improving their investment climates, promoting trade and enhancing economic growth.

Direct foreign investment has been a key ingredient in the success of ASEAN economies in at least three aspects: as a source of foreign exchange, as a conduit for the transfer of technology, and as an avenue for markets for its exports. Total foreign investment that flowed into the ASEAN countries, except for Brunei, totalled US$ 14,840 million in 1994[91]. This included FDI from the EU, as the most important destination of Foreign Direct Investment from European Union (EU.6) were the countries in South East Asia. It accounted for 32% of the total EU's FDI for the period of 1984-85 and 38% in the period of 1988-89[92]. The member countries of ASEAN, individually and collectively, offer a growing array of economic opportunities and extend a wide range of incentives to further attract foreign investment. Developments in the international capital markets have also had a substantial impact on the economic performance of ASEAN, as their economies are to a considerable degree based on a market-type system.

ASEAN has economic ties with most countries in the world but its major trading partners are Japan, the U.S and the EU, and the region's volume of trade has generally increased (see Table 4, p. 121). The inflow of FDI into ASEAN as a whole

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[91] Foreign Direct Investment in ASEAN has steadily increased in the past several years as recorded, it increased from US$ 6,972 million in 1989 to US$ 14,840 million in 1994, and in 1995 FDI reached

in the 1990s also increased (see Table 5, p. 121). As shown in Table 6, Asia has performed well in trade compared to the other regions of the world. Undoubtedly ASEAN has played an important part in this region's trade performance.

Table 6
Selected Trade-Performance Indicators 1970-1993
(Average annual percentage change)

Country Group & Indicator	1970-80	1980-90	1991	1992	1993
Low & Middle Income					
Import Volume	3.5	0.8	11.3	8.6	6.5
Export Volume	2.7	3.6	11.1	5.6	3.8
Sub-Saharan Africa					
Import Volume	-0.5	-4.9	8.8	-1.0	4.0
Export Volume	-0.7	2.1	2.3	1.9	2.4
Asia					
Import Volume	7.3	7.0	16.4	9.4	11.2
Export Volume	8.5	9.6	16.2	12.5	7.4
Europe & Central Asia					
Import Volume	2.4	3.5	2.4	-1.0	0.8
Export Volume	4.0	3.0	13.3	-1.4	-4.0
Middle East & North Africa					
Import Volume	5.7	-4.5	3.6	10.2	1.0
Export Volume	-2.4	-1.6	9.3	-0.4	1.2
Latin America & Caribbean					
Import Volume	0.1	-2.5	21.0	19.0	7.6
Export Volume	2.5	2.7	5.0	6.3	5.6

Source: World Bank
Note: Trade Volume measured in constant 1987 prices and exchange rates.

In the past, trade between the EU and ASEAN was not significant[93]. In 1970, EU trade with ASEAN represented only 1.7% of the Union's external trade and 2.4% in 1980, while the percentage share of EU in ASEAN external trade was 12% in 1981. However, the EU has acknowledged that the trend of trade between the two groups:

> "Has grown significantly, especially since their ninth meeting. ASEAN's exports to the European Union continued to grow faster than its exports to any other market

US$ 14,950 million.
[92] World Bank (1992) Global economic prospects and the developing countries.
[93] Harris, Stuart and Bridges, Brian, 1983; Langhammer, Rolf J, 1985, 1986, 1991; Wagner Norbert, 1991; Imada, Pearl, Montes, Manuel, & Naya, Seiji, 1991; Langhammer, Rolf & Christopher, Hans Reiger, 1988.

> and the EU (EC) was now its second largest market for manufactured goods. EU's exports to ASEAN has expanded at a higher rate than to any other region in the world"[94],

both in volume and percentage shares (see Table 7). Some ASEAN countries are now ranked among the top 20 main trading partners of the EU[95].

Table 7
EU Trade with ASEAN
(Million ECU)

	1958	1960	1965	1970	1975	1984	1985	1986	1987
EU Imports	708	865	872	1,066	2,321	10,061	10,417	9,213	10,037
EU Exports	603	699	887	1,264	2,643	10,166	10,078	8,497	8,906
Trade Balance	-105	-166	15	198	322	105	-339	-716	-1,131
	1988	**1989**	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**
EU Imports	12,203	15,173	16,748	19,947	22,403	25,667	28,785	43,400	53,653
EU Exports	10,689	14,110	16,083	17,282	19,282	22,920	26,230	41,429	43,898
Trade Balance	-1,514	-1,063	-665	-2,665	-3,121	-2,747	-2,555	-1,971	-9,755

Source: Compiled from EUROSTAT statistics, various years

The present volume of trade between EU and ASEAN is 55 billion ECU, five times the volume of trade in 1980 when the EU/ASEAN Co-operation Agreement was concluded. ASEAN enjoyed a remarkable trade surplus of 2.5 billion ECU in 1994[96]. The EU ranks second among the trade partners of ASEAN[97]. It covers 15.5% of ASEAN exports and 13.7% of ASEAN imports[98].

ASEAN exports of manufactured goods to the EU increased from 23% in 1975 to a present 75% of total exports. Exports of ASEAN textiles in particular rose from ECU 148 million in 1980 to ECU 1,846 million in 1988, an increase of 900%[99],

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[94] Joint Declaration Tenth ASEAN-EC Ministerial Meeting, Manila, Philippines, 29th-30th October 1992.
[95] EUROSTAT, 1994 External Trade Statistic Yearbook Recapitulation 1985-1993.
[96] Commission of European Communities 1994. Also see EUROSTAT 1994.
[97] Section 10: Trade and Commercial co-operation stated in the Joint Declaration Tenth ASEAN-EC Ministerial Meeting, Manila, Philippines, 29th-30th October 1992.
[98] Commission of the European Communities, MEMO/94/58 "EU-ASEAN Relations" Brussels, 15th September 1994.
[99] Commission of the European Communities, "The European Community's Relation with ASEAN". Brussels, Europe Information No.1/91, April 1991, p.3.

while raw materials decreased from 36% to the present 6%. More than one third of ASEAN exports to the EU enjoy tariff concessions under the EU GSP scheme, and they accounted for as much as 72% of imports by the Union under the scheme in 1992. Five ASEAN countries were among the top twelve users of the scheme[100]. Thus they are among the major beneficiaries of the EU GSP even though ASEAN has the lowest priority under the scheme: the 69 ACP countries under the Lomé Convention are ranked as first priority. However, despite the EU grants of special support and privilege to the ACP countries especially under GSP, the ACP countries are hardly able to exploit these privileges (Wagner, 1989: 30). They give way to ASEAN, which is at the lowest hierarchy of privileges but enjoys the highest trade under GSP. This is because, as reported by the World Bank and IMF, in the past several years the ACP countries have stagnated with poor economic performance and a debt burden (see Table 8, p. 122).

When considered from the economic perspective of ASEAN and from its position in a changing Pacific and world economy, it can be justified that the EU should have benefits and gain advantages in several aspects of their relationship with ASEAN.

Firstly, ASEAN has implemented the AFTA, which enlarges the ASEAN market for EU exports in this region. The ASEAN population of 500 million has high purchasing power, and the region has a very young population, almost 50% and 70% of the people are below 20 years old and 30 years old respectively. This means a continuous flow of workforce supply at competitive wages, and a rising demand for consumer and household products (Akrasanae, 1991). International investment has also moved to the region, mainly because of the competitive cost of

[100] Section 12 of the Joint Declaration Tenth ASEAN-EC Ministerial Meeting.

industrial/commercial sites and labour, and because of the market-oriented investment policies of all ASEAN countries resulting in trade and investment liberalisation in this area.

Secondly, the creation of the AFTA gives the EU most opportunities to invest in this region, which is endowed with natural resources, low cost labour and skilled management. The establishment of an AFTA will attract trade and FDI into the region because of its economies of scale generated by the intra-regional liberalisation. In addition, AFTA will be moving in train with, and complementarily to, the globalisation process both in the Asia-Pacific region and in the world. This will enhance economic prospects in the region which is hoped will attract EU investment into ASEAN.

Thirdly, ASEAN is in the Pacific rim among the other dynamic Asian countries where important economic co-operation schemes have been implemented, such as the Asia- Pacific Economic Co-operation (APEC), the East Asian Economic Caucus (EAEC), the Pacific Economic Co-operation Conference (PECC), and the Pacific Business Economic Council (PBEC) (Tan Kong Yam, Toh Mun Heng, & Linda Low, 1992: 309-31). ASEAN countries are members of those economic co-operation arrangements and the location of ASEAN is the centre of economic progress in 'the Growth Triangle' and on the line of the Asia's New Economic Frontiers (Kwan Chi Hung, 1993: 6-10) and see Figures 1 and 2 (pp. 118 and 119). The EU's presence in this region, by channelling through ASEAN, closen its links with the whole region. This will benefit the EU in establishing economic bases in this region. Closer European links with ASEAN could help to give greater access to other Asian markets in various ways; through trade, through proximity, and as a means of understanding the Asian way of doing business.

Fourthly, the enlargement of ASEAN encompassing the whole Southeast Asian region will increase economic strength in this region as Indochina, which is developing their economies after the cold war, is becoming a commercial area in Southeast Asia. These ten ASEAN countries will become one of the major trading groups and a major potential region for investment from the EU.

The ASEAN economies are market-oriented with outward-looking policies and open economies, The Union itself has acknowledged that the dynamic growth record of ASEAN's economies has resulted in considerable trade expansion. The EU has also acknowledged that ASEAN's exports to the EU have grown faster than its exports to any other market in the world since 1984[101].

Fifthly, the EU has had a negative impact on trade and investment in other regions such as the ACP countries, even though the EU has a special relations with them, interaction in trade between the EU and those countries has been based on dependence more than interdependence. The Commission reported that:

> "Economic growth in North America, the dynamic Asian economies and EFTA countries more than off set the adverse impact on EC exports of poor economic performances in heavily-indebted countries of Latin America, and Africa, and in the Middle East" (The European Commission, 1993: 8).

So in the long run the EU would not hope to gain any advantages in terms of trade from these countries other than trade with aid, except the Middle East countries which are important sources of energy for the EU. So ASEAN is the alternative choice of the EU for a new dimension in two-way trade.

Finally, the EU would like to maintain its leading role in the world economy. Hence it seeks to strengthen its economic presence in Asia in order to compete with Japan and the United States. Thus close co-operation with ASEAN is a step towards

economic penetration of this region, as ASEAN is the only regional grouping in Asia which combines not only economic but also political elements in maintaining regional stability.

2.2.3 Comparison of the EU and ASEAN integration

Considered from the point of view of institutional structure, the EU and ASEAN have significant differences, especially different mechanisms of regional integration and types of institutional arrangements. The EU, based on French-inspired law and institutional integration (Eliassen, Kjell A. and Monsen, Catherine Borve :1997), has a formal centralised supranational legal and institutional framework facilitating regional integration[102], while ASEAN is less formally institutionalised, and opts for a pattern of co-ordinated networks: based on a decentralised system. ASEAN regional integration has been enhanced by economic production and trade networks[103]. This means that ASEAN regional integration has relied less on a legal and institutional framework or regional centralised governance (as clearly seen in section 2.1.3 discussed above), but rather it has functioned by "non-state actors and authority"[104] based on network co-ordination facilitated by the co-operation of national laws and institutions. ASEAN member countries are committed to the concerted liberalisation of trade and investment at the regional level and then by incorporation of such agreements into national laws and regulation, or applying agreed rules conforming to the general principle, enforced at national level. The concerted actions and the

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[101] Commission of the European Union, "The European Community's Relation with ASEAN", Europe Information No.1/91 April 1991. This growth was confirmed in the Tenth ASEAN-EC Ministerial Meeting.

[102] As the literature on EU institutions and integration mechanisms are considerable and well understood, the author will not repeat the topic here. See for example El-Agraa, A. M. (1998).

[103] Eliassen and Monsen argued that ASEAN regional economic integration has been developed economically by "the production networks, sub-regional economic zones, ethnic business networks, trade patterns, business operations and investments and informal personal contacts". See Eliassen and Monsen (1997: 2)

[104] See Picciotto (1996, 1998) also see Eliassen and Monsen (1997), Beeson and Jayasuriya (1997).

enforcement of the framework agreements have been ensured by the implementation of the Protocol on a Dispute Settlement Mechanism (discussed in chapter 7).

The development of ASEAN and the EU regional integration of course have been different due to their different historical, political, economic and cultural background. The great differentiation in the political, legal, cultural systems of ASEAN countries is obviously a major barrier to the formalisation of regional legal and institutional structures. ASEAN is a much more heterogeneous region compared to the EU. Thus, the major characteristics of non-institutional economic co-operation are informal, gradual and flexible. ASEAN therefore considers that informal approaches are a good way to open up its market while minimising the outside shock accompanying liberalisation[105].

However, in the future ASEAN may become somewhat more similar to the EU, as the further development of ASEAN in trade and investment liberalisation enhances greater needs for rules and controlling institutions in order to be effective and efficient in its implementation of regional economic integration. At the same time, the EU has already developed some more informal patterns of co-operation, as evidenced by the EU's new approach of mutual recognition and the more recent regulatory competition such as in the banking business[106].

2.2.4 Economic Relations/Interdependence between ASEAN, APEC and NAFTA

The success of ASEAN and the Asia-Pacific region has relied heavily both on trade with other countries and investment flows from outside, especially from North

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[105] Peng, Dajin (1997) *An East Asian Model of Regional Economic Co-operation.* Oslo, Norway: Centre for European and Asian Studies. p. 48.

[106] See Bratton, William; McCahery, Joseph; Picciotto Sol and Colin Scott (Eds.) *International Regulatory Competition and Coordination: Perspectives on Economic Regulation in Europe and the United States.* Oxford: Clarendon Press, See introduction.

America and European countries, and also gradually from within the region. Thus the intra-regional and inter-regional economic relations of these economies have been crucial to their economic performance. Tables 9 and 10 (p. 123) show the inter- and intra-regional trade of the three economic blocs, indicating the gradually increasing intra-regional trade in Asia and also the increasing trade with the EU and the North America. On the other hand, the EU and North America are also having positive upward trends in trading with East Asian economies. Table 11 also shows the significance of two-way trade between ASEAN and NAFTA.

Table 11
ASEAN Trade with NAFTA
(US$ Million), 1994

	ASEAN Exports		ASEAN Imports	
United States	53,142.27	20.01%	42,736.34	14.80%
Canada	2,283.38	0.86%	1,809.18	0.63%
Mexico	799.50	0.30%	149.26	0.05%
NAFTA	56,255.15	21.17%	44,694.78	15.48%

Source: ASEAN Secretariat.

Economically ASEAN fears that NAFTA would threaten ASEAN's economic standing in the North American market and would divert trade and investment from ASEAN countries to Mexico. Therefore, for ASEAN, to forge closer economic co-operation with NAFTA both at a regional and national level is very crucial to ASEAN's economic sustainability. Thus APEC, in which all ASEAN and NAFTA member countries are members, functions as a forum for discussion between the western hemisphere and Asia-Pacific, to ensure that any economic tension between them can be resolved.

The Asia-Pacific Economic Co-operation (APEC) was created in 1989, during the period in which the success of the Uruguay Round was not certain. There were

also threats by the USA of unilateral retaliation, and fear of a 'Fortress Europe'. It was formed by countries in East Asia, Australia, New Zealand, North America and some Latin American countries joining hands to develop economic co-operation and liberalisation.

APEC therefore provides a linkage between Asia and the western hemisphere, so in effect it combines two of the triads, i.e. Japan and East Asian economies on one hand, and USA, Canada and some Latin American countries on the other. In 1998, Japan, all high-performing Asian economies and all member countries of NAFTA are members of APEC[107]. APEC's main objective is to strengthen liberalisation both among member countries and the rest of the world. APEC members enter into non-legally-binding agreements based on political commitments and consultation. APEC has thus been characterised as an informal organisation[108] with very loose institutional structures. But Cardenas and Buranakanits (1999: 49) have argued that "APEC's success has resulted from its informal and amorphous nature, and reflects the fact that the forum constitutes a process for co-operation rather than an institution". They concluded that APEC's focus on openness, voluntariness, and decentralisation will continue to foster regional co-operation among its members. This confirms the strong intention of APEC to maintain an open trading and investment regime in the region.

In fact, APEC's members are composed of two groups with two different ideologies. The western members of APEC, led by the US and supported by Canada, Australia and New Zealand, prefer a more formal and effective legal and institutional infrastructure, while the Asian members have insisted on maintaining their Asian Way

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[107]. The current member of APEC are Japan, China, Taiwan, Hong Kong, Korea, Brunei, Indonesia, Malaysia, The Philippines, Singapore, Thailand, USA, Canada, Mexico and Chile.

[108] Pelkmans (1997: 217) argued that it is somewhat difficult to decide whether APEC is an international organisation or a network for dialogue and project co-operation. Also some of its members

as they fear western power domination in APEC[109]. The rationale behind the US's support for upgrading the institutional structure of APEC was to show the EU that it would risk being marginalised if APEC was strengthened and institutionalised, encompassing two-thirds of the world's economy. But after the success of the EU-US solution on agricultural issues in the Uruguay Round, the US placed less emphasis on the institutionalisation of APEC.

APEC can therefore be described as the fulcrum of the triad, containing an engine propelling the openness of the global economy. ASEAN and other East Asian countries joined APEC in the hope of gaining relatively easy access to the US market and of integrating themselves with NAFTA, and also to be shielded from the impact of a possible 'Fortress Europe'. The US, Canada, Australia and New Zealand joined APEC to facilitate penetration of the Asian markets for their trade and investment, and also to threaten the EU (Pelkmans, 1997: 221) if they encountered conflicts in transatlantic relations. The EU, after assessing the increasing economic strength of Asia, expressed its intention to accord closer economic ties with Asian countries, although not with APEC itself (see discussion in section 2.2.2 above). Its aim was to ensure access to Asian markets and to balance the role of the US and Japan in Asia.

Thus, from ASEAN's point of view, APEC operates as an inter-regional institution through which ASEAN's relations with NAFTA, as well as Japan and Australia can be managed in a way that mediates its relations with the EU and the rest

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can hardly be called countries, e.g. Hong Kong and Taiwan, so they are defined as APEC member economies instead of countries.

[109] Dr. Mahathir, the Malaysian Prime Minister, has frequently expressed the 'Asian intention' to exclude the US from involvement in Asian regional integration, and thus the East Asian Economic Caucus (EAEC), which excluded all western countries from being members, was to be strengthened (EAEC was proposed by the Malaysian Prime Minister in 1990 and was established in 1991). However, other Asian countries did not respond strongly to the proposed idea, as they are fully aware of their economic links with the West that outweigh the sentiment of exclusion of the West. The EAEC was however operated.

of the world economy. As ASEAN moves towards deeper regional integration, this role for APEC will become more important as will be discussed in chapter 5.

Conclusion

The emerging new approach of "Open Regionalism" implemented in ASEAN is related to three fundamental elements shaping ASEAN regionalism. Firstly there have been the historical, political, economic and cultural patterns that form the ASEAN Way as well as the interaction between ASEAN states. These factors significantly underpin the decentralised system while remaining coherent with the pattern of co-ordinated networks. This can be clearly seen from the ASEAN institutional structure and its functional mechanisms (discussed in section 2.1).

The second element is the external economic relations of ASEAN with the rest of the world, especially with the integrated EU and the US, that facilitates the integration of ASEAN's economy into the world economy. The third is the changes in the global system in which state policies are ever more shaped by the structure and dynamism of an increasingly globalised world economy and a political system in which the boundaries between the domestic and the international arena have become blurred (discussed in chapter 3). In the case of ASEAN in particular, where business activities play an important role in *de facto* regional economic integration (discussed in section 2.2.3), a minimal formal institutionalisation would be developed just to facilitate the actual economic regional integration. Therefore ASEAN mainly relies on co-ordinated national regulatory and institutional networks in conjunction with co-operation networks of non-state actors and authorities.

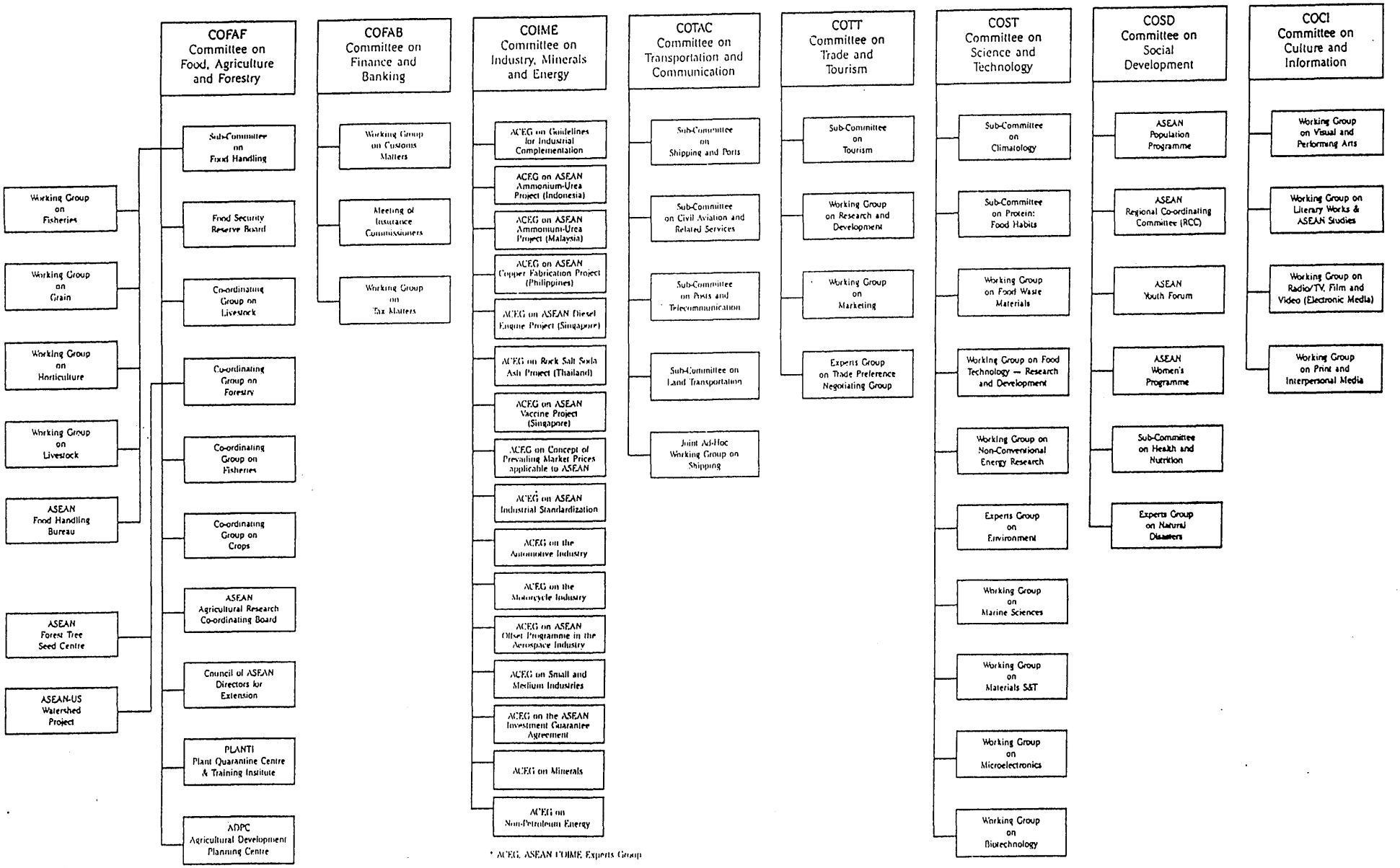
In the EU, "central government" has played a key role in forging regional frameworks serving to shape regional business activities. In ASEAN, it has been the

activities of the business community that have forced government to consider the way of regularising regional relations driving regional economic integration (Garnaut, Ross; Drysdale, Peter & Kunkel, John (Eds.): 1994). The closed economic ties between ASEAN and the EU member countries, the NAFTA (especially the US and Canada), Japan, and among the East Asian countries themselves as well as Australia and New Zealand, have influenced the ASEAN economic pattern that forced ASEAN to keep its regional market open (discussed in section 2.2). The establishment of TNC networks based in those countries propelled the process of intra- ASEAN regionalisation while integrating ASEAN with the world. Therefore, *de facto* economic integration in ASEAN is a result of trade and business operations that have forced through a minimum of regional economic integration arrangements[110]. All these factors influence and shape the ASEAN pattern of regionalisation and the new paradigm of "Open Regionalism". In the next chapter, I move on to discuss the changing factors in the global economic and legal environment that affect ASEAN regionalisation, focusing on the regulation of international investment in the global economy, that has a significant impact on ASEAN countries' policy reform and on laws and regulation adjustment, since investment is the main engine propelling economic growth of the region.

[110] See detailed discussion of *de facto economic integration in ASEAN* in Gallant, Nicole and Stubbs, Richard (1996: 23).

Diagram 1

SUBSIDIARY BODIES OF THE ASEAN COMMITTEES



* ACEG: ASEAN COIME Experts Group

CHART 1

ORGANISATIONAL STRUCTURE OF ASEAN BEFORE BALI SUMMIT (FEBRUARY 1976)

(Adapted from *Ten Years ASEAN*, ASEAN Secretariat, Jakarta, April 1978)

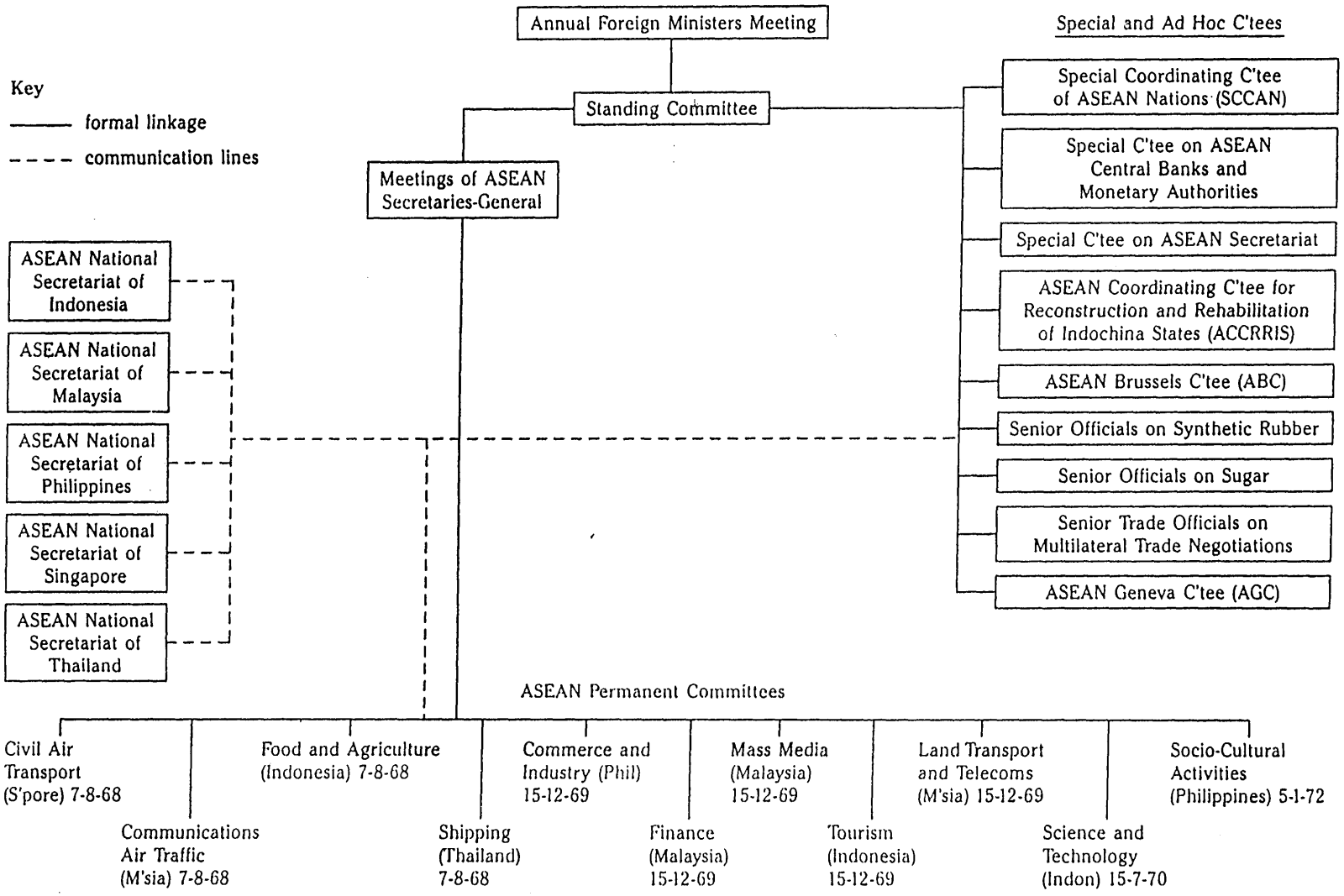
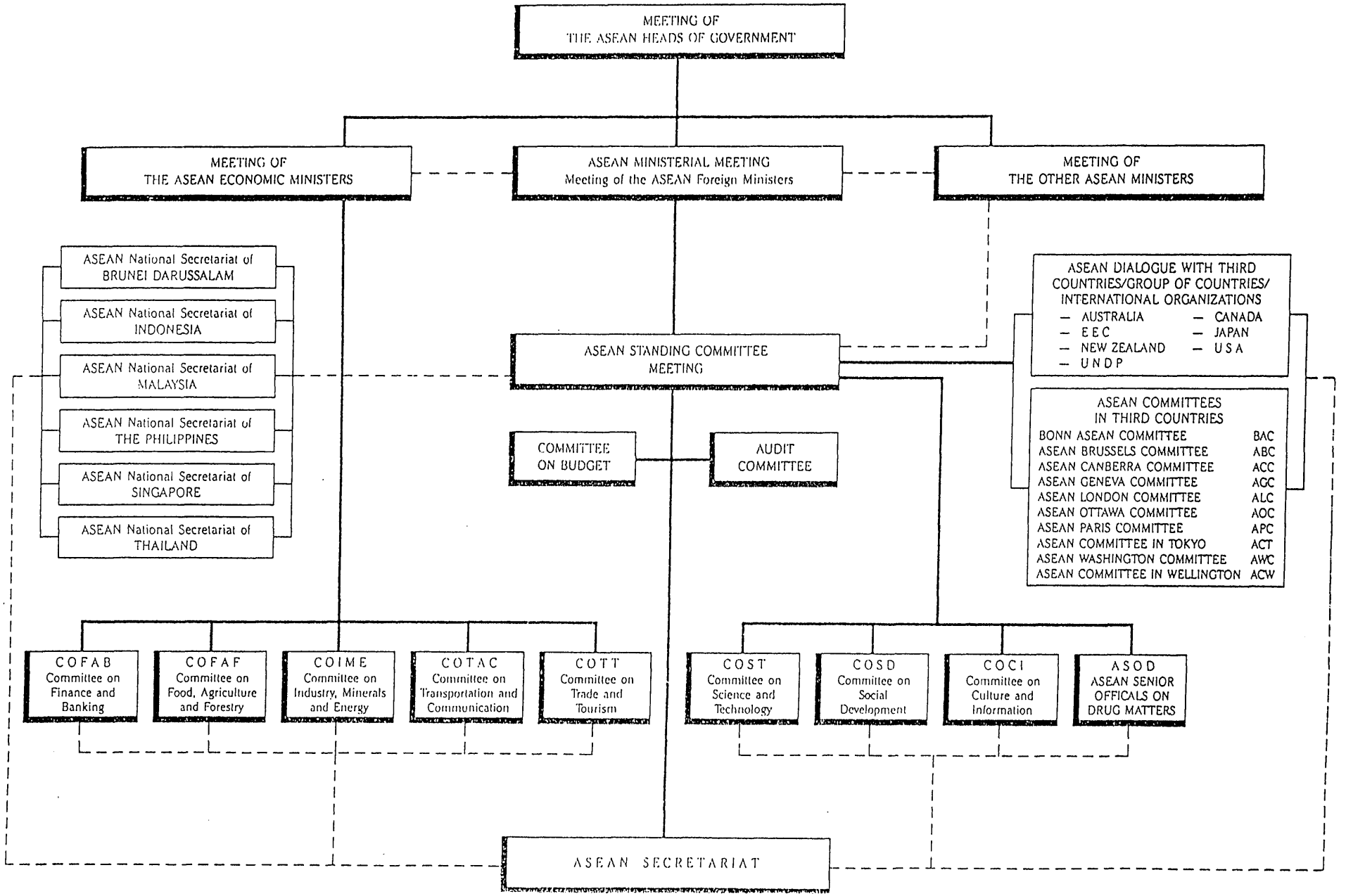


Chart 2

ORGANIZATIONAL STRUCTURE OF ASEAN



ASEAN GOVERNMENTS / ASEAN-CCI INTERACTION CHART

Chart 3

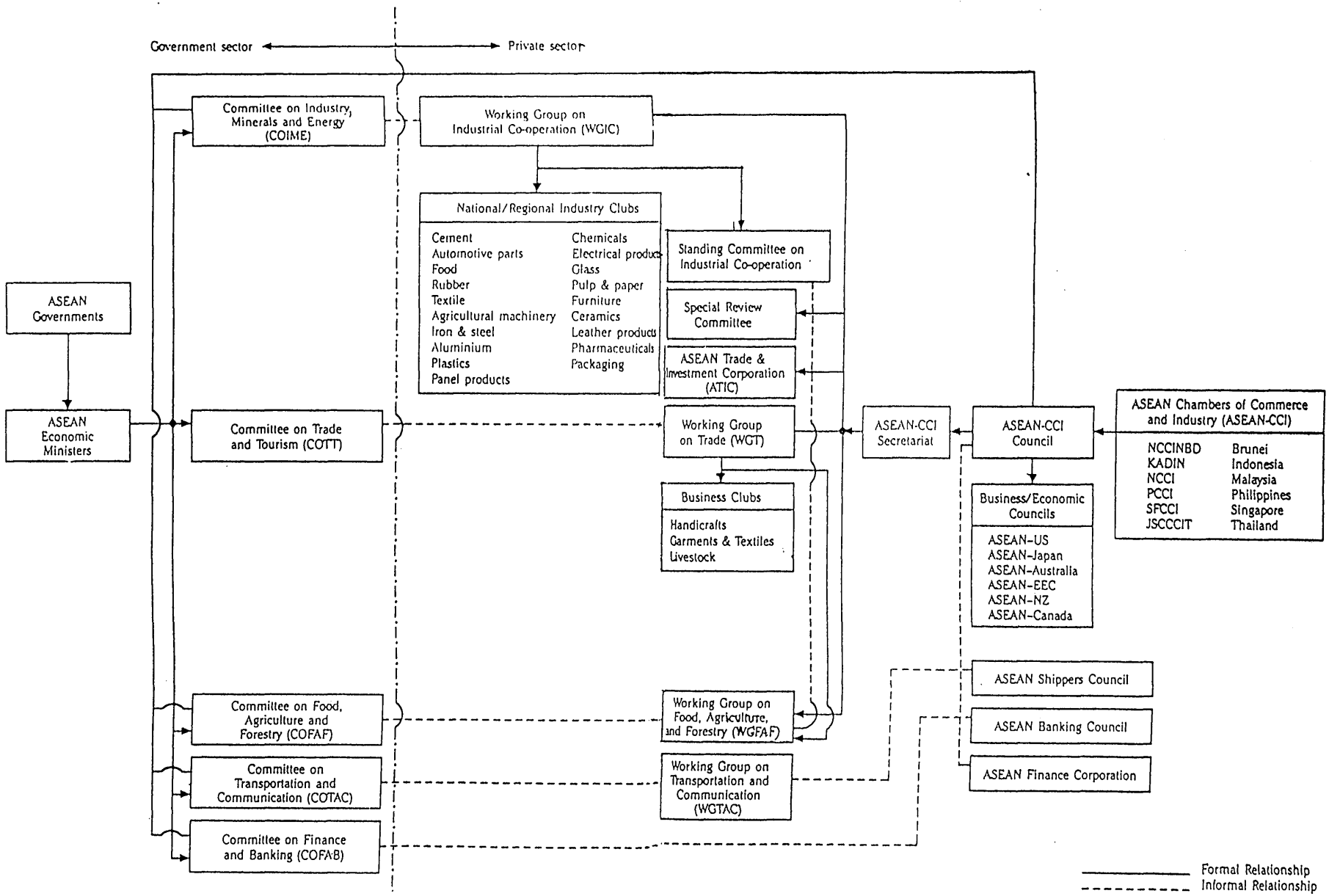
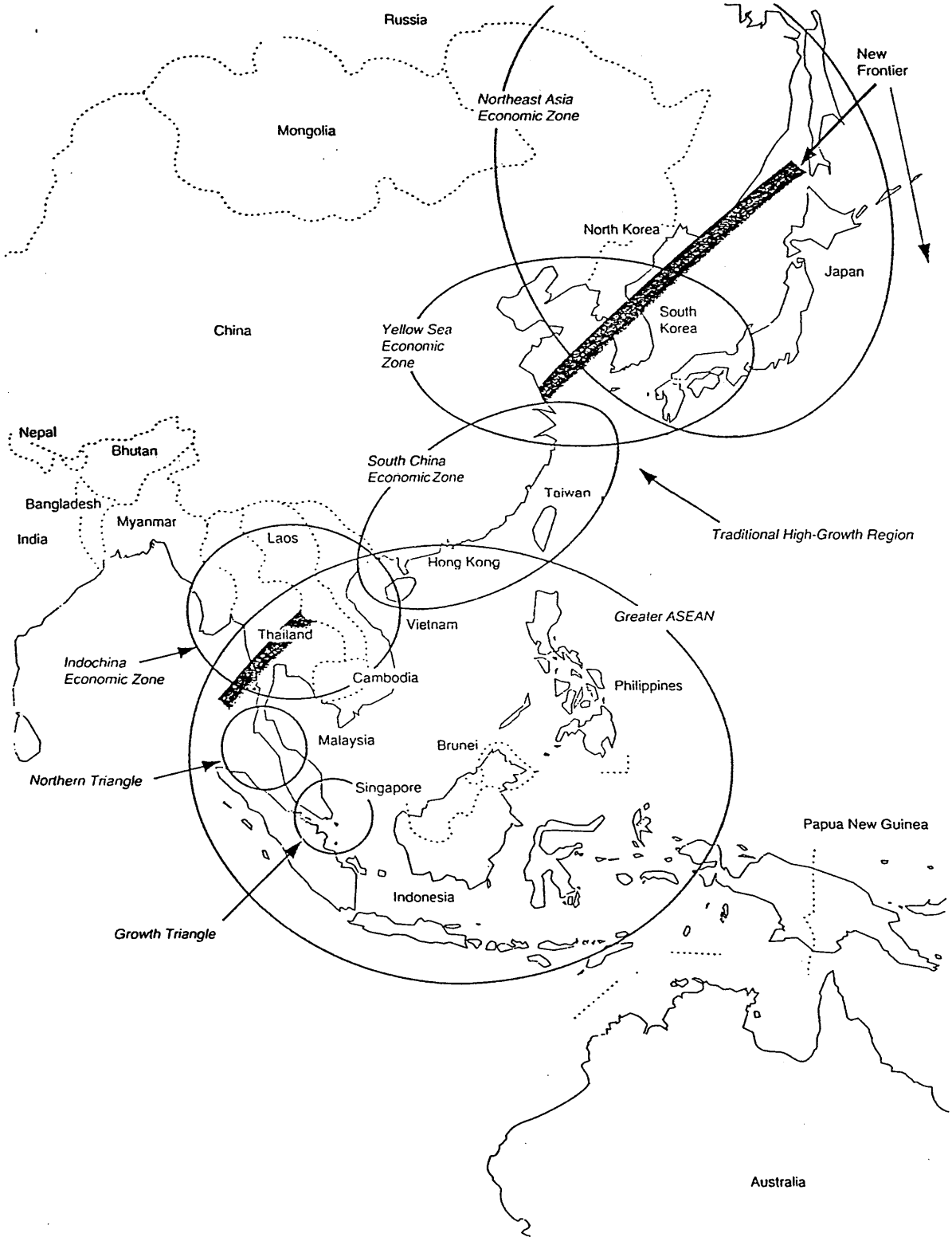
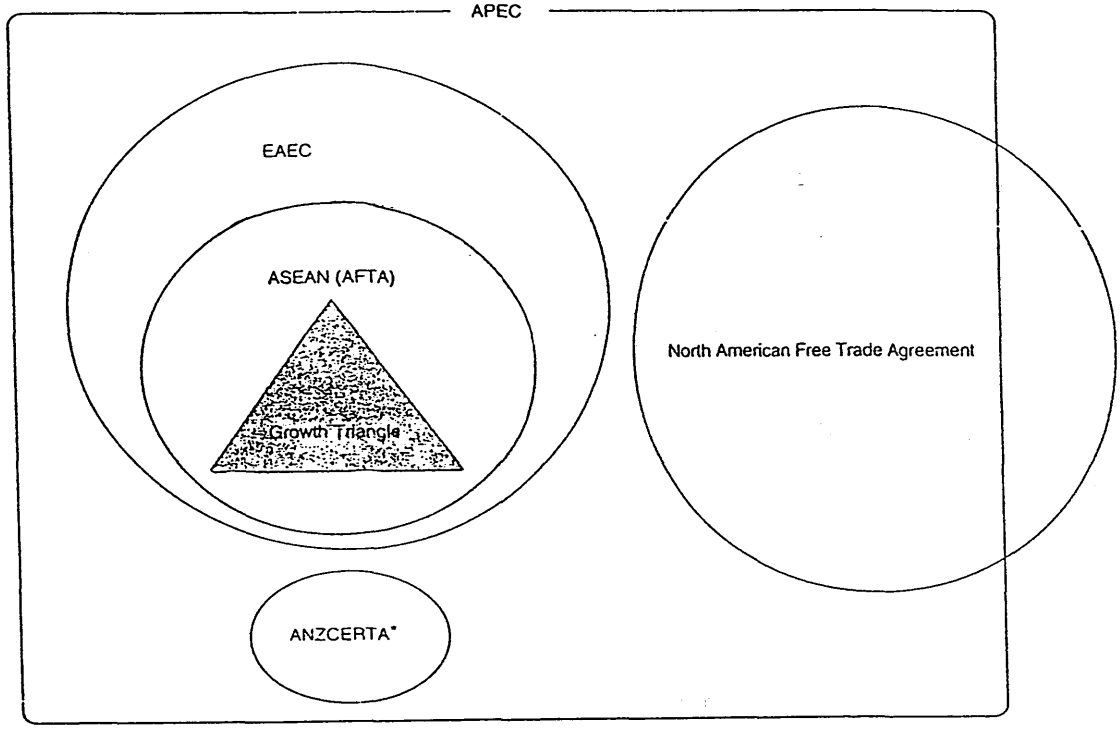


Figure 1
Asia's New Economic Frontiers



Source : Nomura Research Institute

Figure 2
Multilateral Frameworks for Asia-Pacific Economic Cooperation



Source : Nomura Research Institute.

Table 2
The World Economy: Real Growth of GDP

	1990	1991	1992	1993	1994	1995
World	**2.0**	**0.5**	**0.8**	**0.9**	**2.2**	**3.2**
Developed Market Economies	**2.5**	**0.7**	**1.5**	**0.9**	**2.3**	**2.9**
United States	1.0	(1.2)	2.1	3.0	3.3	3.0
Japan	5.6	4.0	1.5	(0.3)	1.3	3.3
Germany	4.5	1.0	1.4	(1.4)	1.9	2.4
Canada	0.5	(1.4)	0.9	3.1	3.9	4.3
France	2.8	0.8	1.7	(0.8)	0.9	2.6
United Kingdom	0.8	(2.2)	(0.8)	1.6	2.6	2.1
Italy	2.0	1.4	1.3	(0.3)	1.7	2.8
Developing Countries	**2.8**	**3.4**	**5.1**	**5.6**	**5.3**	**5.5**
Middle East	0.7	(10.3)	7.0	6.5	4.3	8.6
Africa	2.1	2.4	2.0	2.2	2.2	2.8
Asia	6.0	6.1	7.0	7.2	6.7	6.5
Latin America	(0.9)	3.3	2.4	3.3	2.6	1.9
ASEAN	**8.0**	**6.2**	**5.7**	**6.6**	**6.8**	**7.0**

Source: Compiled from The World Bank Annual Report 1994 and the ASEAN Macroeconomic Outlook 1994-1995, Asian Data Handbook.

Table 3
ASEAN Countries' GDP Growth Rate

	1991	1992	1993	1994	1995	1996
ASEAN	**8.0**	**6.2**	**5.7**	**6.6**	**7.8**	**7.9**
Indonesia	7.2	6.9	6.3	6.5	7.5	8.1
Malaysia	9.8	8.7	7.8	8.5	6.8	9.5
The Philippines	2.7	(0.5)	0.1	1.7	4.2	5.4
Singapore	8.3	6.7	5.8	9.9	10.5	8.8
Thailand	11.6	8.1	7.6	7.7	8.8	8.6

Source: Compiled from ASEAN Macroeconomic Outlook 1994-1995 and ASEAN Secretariat

Table 4
Trade of ASEAN with Major Trading Partners
(US$ Million)

	1993	1994	1995	1996	1997
Export To:	**181**	**214**	**269**	**271**	**297**
Japan	31	34	43	43	42
US	42	49	56	48	70
EU	30	34	43	47	46
ASEAN	43	57	69	78	86
Rest of the World	35	40	58	55	53
Import From:	**194**	**232**	**285**	**316**	**313**
Japan	56	67	78	73	71
US	34	39	46	53	62
EU	29	36	46	57	51
ASEAN	38	47	53	67	68
Rest of the World	37	43	62	66	61

Source: ASEAN Secretariat, 1993-1997
Note: ASEAN excludes Cambodia, Laos, Myanmar and Vietnam (data not available)

Table 5
Foreign Direct Investment in ASEAN
(US$ Million)

	1989	1990	1991	1992	1993	1994	1995
ASEAN-5	6,972	9,736	10,857	12,958	13,362	14,840	14,947
Indonesia	682	1,093	1,452	1,774	1,474	1,564	1,652
Malaysia	1,668	2,332	4,073	4,118	4,677	4,477	4,254
Philippines	575	554	571	798	1,137	1,961	1,452
Singapore	2,317	3,368	2,883	4,287	4,872	5,456	6,068
Thailand	1,730	2,389	1,848	1,981	1,202	1,382	1,521

Source: The Philippines Institute for Development Studies 1994

Table 8
Debt burden of selected countries
(US$ Million)

Countries	Loans
Algeria	2,913
Argentina	5,696
Bosnia-Herzegovina	1,673
Brazil	11,904
Colombia	3,996
Ecuador	1,303
Egypt	2,081
Hungary	3,167
India	14,325
Iran	867
Mexico	17,287
Morocco	5,440
Nigeria	4,630
Pakistan	4,106
Paraguay	343
Peru	2,024
Poland	3,593
Romania	1,381
Russia	2,919
Tunisia	2,357
Turkey	7,797
Venezuela	2,714

Source: IBRD Financial Statements, Summary of Loans as of 30th June 1994
The World Bank Annual Report 1994

Table 9
Intra-regional and inter-regional trade among the three economic blocs 1972-1990
(Percentage of total trade)

	1972	1976	1980	1984	1988	1990
North America						
Intra-Regional	30.4	31.5	32.3	34.0	36.0	34.4
With EU	19.1	18.1	18.6	18.4	18.6	20.8
With East Asia	18.7	19.6	18.2	18.3	28.6	28.0
EU						
Intra-Regional	60.2	62.2	50.6	53.1	58.9	60.6
With N. America	9.9	8.1	8.7	9.5	8.9	10.8
With E. Asia	5.2	5.6	4.9	6.3	6.9	7.4
East Asia						
Intra-Regional	30.3	31.7	32.8	33.4	37.2	39.4
With N. America	19.1	22.5	22.1	29.1	31.8	28.9
With EU	12.2	12.1	12.2	12.5	13.8	16.3

Source: International Monetary Fund, Direction of Trade Statistics, various issues.
* **East Asia:** Japan, NIEs and ASEAN, excluding China

Table 10
Intra-East Asian Trade (US$ billion)

	1980	1985	1990	1993
Intra-Asian Exports	96	127	279	418
Intra-Asian Imports	91	127	288	441
Total Asia Exports	288	381	735	1006
Total Asia Imports	296	348	699	906
Intra-Asian Trade as a Percentage of Total Trade	**32.8**	**34.7**	**39.4**	**43.7**

Source: IMF, Directory of Trade, various issues.

Chapter 3

Regulation of International Investment in the Global Economy

Introduction

This chapter will analyse the interaction of legal and economic factors in FDI policy that effects the policy changes and legal adjustment of ASEAN countries, and which have led to the implementation of ASEAN open regionalism.

The legal framework governing foreign direct investment consists of national investment laws, administrative regulations and policies as well as bilateral investment agreements that have been developed for ensuring the protection and fair treatment of foreign investment[1]. In fact, there are no comprehensive international investment regulations existing in today's world[2] but rather the BITs networks that governs the international investment activities in addition to the national investment laws and regulations. As Muchlinski has pointed out,

> "if one were to look at legal sources alone the MNE [multinational enterprise] would not exist: all one would find is a series of national companies whose principal shareholder happens to be a foreign company, and/or a network of interlocking contracts between entities of different nationalities". (Muchlinski, 1995:lv).

Therefore MNEs or TNCs (the terms are used interchangeably) are mainly subject to national laws of the host countries, where they are established, that vary considerably and have different standards regulating FDI. This is because it is accepted in international law that nation states have sovereignty to screen and control foreign investment or even to expropriate foreign properties[3]. Thus, the entry and establishment of foreign investors is generally left to the host country's discretion.

1See UNCTAD (1988:1).
[2] See Sornarajah (1994: chapter 6, p. 225-236) Also see Schwarzenberger, G. (1969: 109-20).
[3] Schwarzenberger, G. (1969).

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

In order to seek solutions for such problems, the three players must compromise on a rule-based approach. On the one hand, there is a need for some standards/guidelines for regulating firms' behaviour and their liabilities/responsibilities to host and home countries. This entails a certain level of coordination or harmonisation of national controls by host and home country over TNCs, by trying to set international standard or a common agreed set of rules and regulations governing FDI. Countries, especially developed capital- exporting countries, and various international organisations[4] have endeavoured to reach these aims[5] and to tackle the problems of legal disparities among nation states.

However, in the international sphere, it is difficult to develop a multilaterally agreed set of rules for governing FDI[6]. BITs have thus developed in order to provide a certain level of legal stability and are now relied upon by developed capital- exporting countries as part of their effort to safeguard the investments of their nationals[7].

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[4] See UNCTAD (1996c: Volume III) also see Muchlinski (1995: 573-616) and Sornarajah (1994:187-224). However, they were mainly developed in a "soft law" form.

[5] See UNCTAD (1996c) extensively discussing various agreements on FDI, also see Muchlinski (1995: chapter 16.) discussing the codification of international standard for the treatment of foreign investors. But so far they have not yet achieved hard law multilaterally agreed rules for host and home countries of FDI, and only BITs have developed as the main instruments for FDI, see Muchlinski (1995: chapter 17), Dolzer &Stevens (1995), Sornarajah (1994: chapter 6).

[6] This is due to the conflict of interest and the different ideologies between developed and developing countries and countries of different political systems therefore the host and home states of foreign investment cannot reach the same criterion or agreed rules for the FDI, see Sornarajah (1994: 27-29).

[7] See UNCTAD (1988:1).

However, BITs do not entail host country investment liberalisation[8] but rather, as mentioned above, ensure the protection of foreign investment in the host country. BITs are generally based on negotiations between the host and home countries, hence the terms and conditions of BITs vary depending on the position of the contracting parties to each BIT (discussed in section 3.4 below).

Under such circumstances, investment liberalisation would be made at a national level under national investment laws and regulations depending on the host countries' policy (discussed in section 3.3, which shows the interaction of economic factors in legal and FDI policy). It appears that hardly any country fully liberalises investment without any conditions. Even though there has been a surge of investment liberalisation, especially when investment capital is needed by developing countries, such liberalisation always requires foreign investors to comply with national investment priorities or to meet conditions for obtaining investment incentives. Countries compete with each other to attract FDI and to offer attractive national investment laws and regulations, so few disciplines have been agreed especially in relation to investment requirements and incentives. This situation both allows TNCs to gain windfall profits from regulatory/treaty shopping, while on the other hand they encounter difficulties from the regulatory differences in host countries.

The implementation of regionalisation, especially the regional integration arrangement that focuses on investment liberalisation, thus has been regarded as a "fast track" in investment liberalisation[9] contributing to the process of global investment liberalisation, and this further contributes to the development of a multilateral agreed set of rules governing FDI. It is argued that regionalisation and the establishment of international investment regulations are complementary. On the one

[8] Investment liberalisation is regarded as the main issue as foreign investors require an equal right of entry and establishment in host countries.

hand, regionalisation would help enlarge the liberalised investment areas so that it would be easier to establish a common set of rules for international investment. Once many parts or regions of the world have liberalised, they would have similar standards, rules and regulations so that it would be easier to converge such rules and regulations towards common models. On the other hand, if a multilaterally agreed set of rules could be established and accepted by nation states, it would also be a great contribution to the further liberalisation of international investment. Because investors could freely invest subject to the same rules and regulations in any country they consider appropriate, they would have more confidence and security in their investments. The interaction of regionalisation and the establishment of an international standard is closely linked to the international economic changes and evolution, as well as the nation states' policy adjustment that was also affected by the international economic environment (discussed in section 3.3.3).

Considered from this point of view, ASEAN open regionalism based on regional investment liberalisation needs to consider both national investment laws and ASEAN countries' BITs (because they are the legal frameworks governing foreign investment), as well as the impact of the changing international economic and legal factors, in particular, the emerging concept of the creation of a MAI to govern international investment. ASEAN countries would be required to further liberalise their national investment laws to conform to a feasible MAI, which would provide a higher standard of treatment for foreign investors. ASEAN countries may be under pressure to accept a MAI to ensure the confidence of investors from the OECD countries. Therefore, if ASEAN countries accept a MAI, it may replace the existing BITs, and thus they would need to change many of their national laws and policies in

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

order to comply. All these changes would reinforce the process of open regionalism.

The purpose of this chapter is to discuss the international economic factors that shape the international investment regime, and the changing global legal and economic environments that crucially impact on the ASEAN countries' investment laws and policy changes. This chapter clearly shows the interaction of global economic and legal factors in FDI policy in nation states (discussed in section 3.2), including ASEAN countries, that has led to the creation of an ASEAN investment area by adopting regional investment integration: the launch of AIA. The discussion in this chapter thus leads to the analysis of the current ASEAN investment regimes and BITs based on the theoretical background discussed in this chapter. The result will show how ASEAN national laws have changed and needed to change to further the process of open regionalism, it also discusses the legal aspect of ASEAN BITs, and how to tackle the problem of differences between the ASEAN BITs.

This discussion of BITs in this chapter establishes the theoretical background for the analysis of ASEAN BITs in chapter 4. It also clearly shows that the BIT is a *lex specialis,* and BITs have considerably different terms and conditions, so that it has remained possible for ASEAN countries to maintain different treatments of foreign investors. However, the trend towards a stronger non-discrimination and investor protection standard, as revolved in the MAI, has led to the new open regionalism approach, including the AIA. The discussion on MAI[10] will only focus on its substance, relating to AIA, that would affect the current ASEAN investment laws and policy, especially to pin point the aspects of their national laws and policy that ASEAN countries need to modify in the process of "open regionalism". Also ASEAN countries should play more part in negotiating a MAI, if possible (since a MAI would

[10] For excellent analysis on MAI see Picciotto (1999: chapter 5).

possibly be accepted by ASEAN).

The trend of development of international investment regulations in the context of the changing international economic system has been driven especially by the activities of transnational corporations (Dunning, 1993; Michalet, 1994: 9-12). The development process of international investment regulation, and of international law on foreign investment and national investment laws, interact with the evolution of the international economic and political system, as well as the globalisation process (Dunning, 1992: 7-45). These developments have implications for investment policy adjustment and the development of investment laws and regulations in the ASEAN countries not only to enable them to keep pace with rapid change in the global economic system, and be consistent with the global regulatory regime, but also to facilitate the implementation of ASEAN open regionalism.

I will firstly analyse the role of transnational corporations in changing the international economic system, and consider the interaction between the regulation of foreign investment and the global economic system. Secondly, I will analyse the debates around the global regulatory regime for foreign investment. Finally, I suggest how ASEAN countries should respond to this trend, and adjust their economic policy and develop their national investment laws and regulations in harmony with the changing global regulatory regime. In the same time such legal and policy changes would facilitate its open regional investment area.

3.1 The Role of Transnational Corporations in Changing the Global Economic System and its Implications for Nation States

3.1.1 Transnational Corporations and the Changing Global Economic System

The growing role of transnational corporations has not only contributed to the rapid economic development of the world economy (Dunning, 1974; UNCTAD,

1995b), but have also changed the very nature and structure of the international economic system (Michalet, 1994). This dramatic change is a result of the emerging process of integrated international production, and the proliferation of cross-border linkages (UNCTAD, 1993), which are mostly the activities of transnational corporations networks.

The world economy is totally different today from that of fifty years ago. At that time, the classical trade theory was uni-dimensional, only focusing on trade among nations. The benefits of free trade and the subsequent optimal allocation of resources were considered to be essentially related to the exchange of goods and services among nation states based on the principle of comparative advantage (Ricardo, 1951-55). Generally, capital flows, technology transfer and labour migration are excluded from this model (Michalet, 1994: 4), and comparative advantage is determined by the factor endowments of nation states. These endowments - labour, capital, land and technology - must be subject to constant returns to scale. According to the static comparative approach, factor immobility within the borders of a nation state is the most crucial determinant. Country borders determine the characteristic of the "location" where factors of production are combined in perfectly competitive markets. In this perspective, nation states are the main actors in the international economy and have the most important roles in policy- making as well as creating laws and regulations, and states have the absolute authority and sovereignty to control economic activities within their borders.

The new world economy, by contrast, is characterised by close interaction between FDI, trade, technology transfer, finance and skilled labour, in a multidimensional and complex set of interrelations. Trade has become part of a package of international integrated activities through TNCs, which are the main actors

in the new world economy. Therefore the strategies and structures of the TNCs have been evolving. TNCs have followed global strategies and have adopted global structures (UNCTAD, 1993), so that now the borders of national economies have become blurred. This indicates the interaction between globalisation and business firms' strategies.

3.1.2 TNCs and New Forms of Socio-Economic Integration

Over the past decades there has been growing integration of national economies fuelled by the rapid growth of international trade and investment that links national economies together[11]. International trade in goods and services grew faster than gross domestic product (GDP), and the growth of international investment was even faster[12] than the growth of trade. Global foreign direct investment (FDI) in the period 1980-1988 rose 1.5 times faster than trade (UNCTAD, 1992); there are up to 39,000 parent firms, which invested in their 270,000 foreign affiliates, which reached US$ 2.7 trillion in 1995 (UNCTAD, 1996b: XIV). This is the result of the evolution of TNCs' strategies and the modification of their organisational structures in response to the changing global economy, and particularly in response to imperfections in goods and factor markets (UNCTAD, 1993: 113; UNCTAD, 1996b: XIII). This has evolved from the simple functional and geographical links between parent firms and their foreign affiliates towards those involving broader and more complex forms of integration (UNCTAD, 1993: ch.V-VI). The most important feature of TNCs' strategies and organisational structure adaptation is the exploitation of the

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[11]. International trade and investment has been carried on by transnational corporations through complex corporate strategies and an intricate network structure. TNCs engage in international production characterised by sophisticated intra-firm division of labour for each corporate function. Therefore, trade and investment flows between countries channelled through TNCs are enormous and this has facilitated the integration of national economies. (Michalet, 1994; UNCTAD, 1993).

[12]. UNCTAD reported in the World Investment Report 1996 that "Investment flows in 1995 increased by 40%, to an unprecedented US$ 315 billion.... Foreign direct investment is a major force shaping globalisation. The outward FDI stock which the 39,000 parent firms invested in their 270,000 foreign affiliates reached US$ 2.7 trillion in 1995. Moreover, FDI flows doubled between 1980 and 1994

internalisation of the TNCs' networks which enable TNCs to strengthen their ability to achieve economy of scale in production and distribution, and their ability to achieve co-ordination economies in many industries. TNCs networks established in various parts of the world help reduce transaction costs due to both geographical and business proximity as well as internalised managerial structure, as they are set up the spider-webbed structure. Intra-firm transactions include distributing products, disseminating R&D, technology transfer and providing advanced market strategies, all could be made with decreased transaction costs. The existence of TNCs network in various host countries replaces market transactions by internal transactions to avoid imperfections in the markets for intermediate inputs. All firms' activities, including marketing, research and development, and training of labour, are interdependent and are related through flows of intermediate products, mostly in form of knowledge and expertise. The internalisation of transactions can bypass the market and keep the use of technology within the firm. This produces an incentive for the creation of intra-firm markets and thus reduces transaction costs. The growth of internalised activity suggests the presence of substantial efficiency gains (Coase, 1988: 33-56).

The internalisation of business is of course not a new thing. It began during the latter part of the 19th century (Wilkins, 1970), and accelerated greatly during the 1950s and the 1960s. Initially, the predominant TNCs originated from the US (Wilkins, 1974 and 1989), but during the 1970s this event slowed down due to the economic downtrend, including the two oil shocks and the widespread incidents of nationalistic reactions to multinational corporations. But during the 1980s, the globalisation of business again accelerated, with a surge of European and Japanese firms competing with US firms, and the United States became host to large numbers

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relative to both global gross fixed capital formation and world GDP.

of subsidiaries of firms headquartered outside the United States (Bergsten and Graham, 1992: 15; Graham and Krugman, 1991).

What is new in the globalisation of business is firstly the number of firms that have created international operations[13] and the number of nations that are home and host to such firms, and secondly, the more complex and wide scope of their operations as well as the more integrated structural networks of these firms. The international business corporations are increasingly global in terms of the scope of their operations and the nature of their concerns. However, business firms are still subject to national laws of the host country where they located. The new form of socio-economic integration created by this kind of global corporation thus has the main feature of complex integration within its networks. In complex integration strategies, any value-added activities can be located in any part of TNC network systems, and integrated with other activities performed elsewhere, to produce goods for national, regional or global markets. The decision of where to locate an activity is based on its expected contribution to the overall performance of the corporate system as a whole. A firm's organisation structure becomes correspondingly complex, involving multi-directional linkages and flows within the firm and also with unrelated firms. By this means, they achieve near-maximisation of global benefits and they can even find ways to circumvent or neutralise efforts and powers of national governments (Bergsten and Graham, 1992: 19). Integrated international production allows TNCs to reap the benefits of economies of scale and scope from increased internal functional specialisation and international division of labour. The 1993 World Investment Report indicated that:

> "TNCs in the largest home countries have internationalised their value-added activities and internalised the exchange of goods and services to such a degree that

[13]. In 1990, the number of firms that could meaningfully be called multinational was well over one thousand. See Julius (1990) cited in Bergsten, C. Fred & Graham, E. M. (1992) p.16.

> global sales of affiliates are considerably larger than export in delivering goods and services to markets world-wide" (UNCTAD, 1993: 213).

There is an interesting record showing that, for instance, in the case of the US TNCs networks, the share of intra-firm trade in the US total trade in 1993 reached 80-90% in many manufacturing industries (UNCTAD, 1996b: 103-4, and see Table 1 below).

Table 1
Shares of Intra-Firm Trade in the International Trade of US Parent Companies and their Foreign Affiliates, by Industry, 1983-1993

	Parent Firms				Foreign Affiliates			
	Share of Intra-Firm Exports in Total Exports		Share of Intra-Firm Exports in Total Exports		Share of Intra-Firm Exports in Total Exports		Share of Intra-Firm Exports in Total Exports	
Sector & Industry	**1983**	**1993**	**1983**	**1993**	**1983**	**1993**	**1983**	**1993**
Petroleum	13.8	32.1	21.8	30.5	47.8	47.3	54.8	75.8
Mining	8.6	-	-	-	19.4	15.5	43.7	79.2
Manufacturing	43.0	48.5	60.6	63.4	70.3	74.2	83.4	**82.5**
General Machinery	61.5	74.9	74.9	75.8	76.1	**84.3**	92.7	**87.0**
Electronics	32.6	39.2	54.1	45.2	73.1	76.6	89.2	**93.2**
Transport Equipment	49.3	45.9	84.5	77.0	89.3	**87.9**	81.3	76.1
Wholesale Trade	9.2	13.8	6.2	10.3	37.5	57.0	88.6	**93.4**
All Industries	33.8	44.4	37.9	48.6	55.2	64.0	82.8	**85.5**

Source: UNCTAD, World Investment Report 1996, based on United States, Department of Commerce, 1986 and 1995

This new form of socio-economic integration is enhanced by the transfer of technology, movement of finance and labour, and the mobility of created factor endowments (Dunning, 1992). Technological change has become extremely rapid, notably in the information technologies. For instance, computer-aided manufacturing has been combined with organisational changes in production, and the impact of the information revolution in services has led to a major expansion of TNCs in areas such as banking and telecommunications (Safarian, 1991: 187-203). TNCs have in part responded to these changes and, in part, are the major purveyors of the change. And indeed, it is the TNCs that initiate new innovations and high technology advancement.

In the light of these new characteristics of TNCs and their advanced

technological management skills and strategies, economists have revised the economic theory for explaining the phenomenon and activities of TNCs and have assessed the impact of the complex integration of TNCs on the world economy and the implications for nation states' policy adjustment (Rugman, 1975, 1980; Agarwal, 1980; Majumdar, 1980; Chang and Katayama, 1996).

Today TNCs can determine the suitable location of their networks and with the help of the "created endowments", which play an important role in international investment, TNCs can even create their own business kingdom. TNCs have the power to endogenise an imperfection and perpetuate a firm's specific advantage (Rugman, 1980). Yet most market imperfections that exist in the real world are truly exogenous or are erected by governments, such as tariffs, taxes, and controls on international capital (Dunning, 1992). This is particularly relevant to the explanation of the rise of the TNC networks. While the formation of the internal market is usually in response to a market imperfection, the continued exploitation of a firm's specific advantage often serves to maintain the advantage in an endogenous manner. Rugman concluded that "thus the MNE is both a victim of external market imperfections and a villain in seeking to retain them" (Rugman, 1980: 376).

Indeed, location-specific factors, which attract FDI by TNCs, differ from the traditional concept of factor endowments, as there are no longer just "natural endowments" but increasingly "created" ones that are the determinants for international investment. Moreover, TNCs have the ability to create "specific factor endowments" by their possession of advanced technology and information as well as the technological administration, strategies, marketing power and the use of multimedia in advertising (Dunning, 1992).

The location chosen by TNCs will depend on its strategic value to the firm. In

general, TNCs will locate in the county where they can maximise revenue, have less cost and less tax burden. Moreover, the extent to which TNCs are able and willing to switch locations varies according to industry, firm and country-specific differences. Therefore for some countries that are part of large integrated markets, and for some activities, there is evidence that re-siting of TNCs has occurred and continues to occur. It can be clearly seen that new locational-specific factors, with sophisticated technology enhancing the creation of created assets, have been the main determinants of FDI in today's world economy rather than the country's traditional natural endowments. Although a country's natural endowments are still important as they are the factors of production in various industries, especially in labour-intensive industry, now created assets are more important in sophisticated technology industries. This is because the composition of economic activity has switched from the one based on natural assets to the one based on created assets, and the sectoral composition of FDI has shifted toward tertiary industry (United Nations, 1993: 20), which concentrates on sophisticated technology. This makes created endowments increasingly important to FDI. Created endowments enable TNCs to locate their network worldwide without constraint. This facilitates both internalisation and the globalisation of TNCs.

The global approach of TNCs thus means that within the TNCs' networks there are no economic borders;[14] TNCs' networks can be settled wherever they consider best suited, to their own advantage. TNCs' main target is expanding world market share and pursuing "the profit-maximising goal" (Vagts, 1970: 744). Their foreign affiliates located in different countries, tend to be specialised and flows among them are internalised to reduce transaction costs. Moreover, these affiliates may function as suppliers, or marketing bases, as well as research and development centres

[14]. In the new world economy, the political frontiers of a country no longer coincide with the economic borders. The multidimensional nature of international production and transaction operated by TNCs in

depending on their nature, location, operation and competitive position.

Therefore, with factor endowments continuously changing, it is no longer possible to define a nation-state's comparative advantage in a static manner. For instance, low labour cost may not be an advantage in setting up a sophisticated high-technology industry, instead skilled technicians and educated labour may be needed even though the real wages are higher. On the other hand, labour-intensive manufacturing industry may consider low labour cost and availability of natural resources as advantages. TNCs are thus locating their activities according to the comparative advantages of potential host countries, either with the location of new activities, or the relocation of existing ones. Nowadays, FDI is becoming a crucial determinant of a country's pattern of specialisation. With TNCs following global strategies and structures, any effort to assess a country's competitiveness on the basis of its current account is misleading. Therefore, Michalet has pointed out that "the new way of comparing the level of economic development among countries is by observing their predominant forms of integration into the world economy" (Michalet, 1994: 13).

Today, the world economy is a multidimensional system within which decisions affecting the location of production facilities and activities are made by transnational agents operating in oligopolistic markets[15]. In addition, increasingly, the funding of economic activities is made by transnational banks taking advantage of offshore financial centres. This facilitates the mobilisation of capital responding to the locational decisions of TNCs' global networks.

Consequently, policy makers have to consider together trade flows, capital movements, inward and outward FDI, technology flows and labour movement,

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various countries integrated those countries into the complex world economy.

[15] This means TNCs can choose to locate production where they consider they would be able to

because imports and exports of goods and services are no longer the exclusive forms of economic transactions among nation-states. The various dimensions of the world economy are tightly interconnected. Countries are connected through inward and outward flows of trade, FDI, technology and capital. In particular, trade and investment have become closely interlinked and governments have to consider them together in economic policy-making. Moreover, nation-states and enterprises increasingly need to co-operate, as competitive performance is more and more dependent on the countries' and firms' ability to combine various fields of expertise. As the TNCs' networks spread, measures for strengthening local production units that are efficient and able to comply with the networks' specifications might become important in attracting TNCs by means of FDI promotion.

3.2 Legal and Policy Implications for States

The implications of the global strategies and structures of TNCs are that nation-states are no longer the only players in law and policy determination. Nation states need to take a worldwide perspective in designing laws and regulations as well as the economic policy. For instance, if a country employs protectionist measures, they could hurt those of their export-oriented national firms that are located abroad[16].

In the past, many host country governments were suspicious of foreign investors (Muchlinski, 1995: 6-7), afraid that they would dominate in competition with local firms for domestic market share and damage domestic industries; in other

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maximise economic returns from their integrated operations.

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

words, the fear was about foreign control of local economies. Fear was growing that TNCs would completely conquer the economy of the host countries. Moreover, they feared that TNCs were a threat to their sovereignty. They believed that there were sensational abuses of international corporate power, especially by US firms. The US government itself was aware of this situation and checked abuses by its own corporations. This resulted in, for example, the passage of the Foreign Corrupt Business Practice Act in 1977 (Muchlinski, 1995: 7).

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

Since the late 1970s, government attitudes towards TNCs have changed drastically (Muchlinski, 1995: 9-11; Michalet, 1994: 16; Sornarajah, 1994: 8-20, 68). Instead of being suspicious of TNCs, governments now welcome them. Especially when capital has been scarce, countries compete fiercely with each other to attract

foreign investment. Michalet pointed out that "investment laws and regulations in most countries have been changed dramatically"[17]. With a global strategy, outward FDI as well as mergers and acquisitions are all aimed at strengthening a firm's competitiveness in the world market. Therefore, local constraints, complex regulations etc., are no longer acceptable to TNCs because they increase transaction costs and thus affect their international competitiveness. Michalet pointed out that "a global firm is not ready to spend a lot of time negotiating with a host country government; instead, it looks for another, more convenient location". Thus, countries appear to be no longer in an absolute position to screen and control potential investors, as was the case in past decades.

In most countries, investment codes have been liberalised, incentives have been used and administrative procedures have been simplified. At the same time, countries have established investment promotion agencies to attract and service foreign investors in order to improve the country's image abroad and to implement promotion strategies. Foreign investment promotion is the key priority of host countries. As trade-related investment measures have to be eliminated[18], countries are replacing them with alternative strategies: creating an attractive investment climate, the liberalisation of FDI laws and regulations, and opening service sectors and financial markets. Ultimately, the ongoing liberalisation of foreign investment regulatory frameworks may reduce inward investment controls and strengthen FDI

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[17] See Michalet (1994). Many Asian countries began to liberalise investment rules in order to attract FDI, particularly in conjunction with investment incentive packages. BOI offices were established in each country to monitor foreign investments. The surge of industrialisation began in the 1970s in this region, even though in that period policies aimed not at generalised liberalisation but rather to liberalise investment in particular areas. See ESCAP (1998) for detailed studies of investment liberalisation in APEC economies since the 1970s. Also Latin American countries which were previously hostile to FDI turned to welcome foreign investment due to their need of capital. Also privatisation began to be implemented in various countries especially in Europe and North America, Parker, David (ed.) (1998).

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

protection, as well as promote the free flow of foreign investment.

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

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

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

investment regulation and provides example of some important agreements of such level (see Table 2).

Table 2
International Investment Arrangements

National level		Regional level	Global level
National Law	**Bilateral Treaty**		
National investment laws and regulations	Treaties of Friendship Commerce and Navigation	1961 OECD Code of liberalisation of Capital Movements	1948 Havana Charter
	Bilateral Investment Treaty, Bilateral Double Taxation Treaties		
		1961 OECD Code of Liberalisation of Current Invisible Operations	1958 Convention on the Recognition and Enforcement of Foreign Arbital Awards
		1963 OECD Model Tax Convention on Income and on Capital	1962 UN GA Resolution 1803 (XVII) : Permanent Sovereignty over Natural Resources
		1967 Revised Recommendation of the OECD Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade	1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States
		1967 Draft Convention on the Protection of Foreign Property	1974 UN GA Resolution 3201 (S-VI) : Declaration on the Establishment of a New International Economic Order and UN GA Resolution 3202 (S-VI) : Programme of Action on the Establishment of a New International Economic Order
		1969 Agreement on Andean Subregional Integration	1974 UN GA Resolution 3281 (XXIX) : Charter of Economic Rights and Duties of States
		1970 Agreement on Investment and Free Movement of Arab Capital among Arab Countries	1976 Arbitration Rules of the UN Commission on International Trade Law
		1973 Agreement on the Harmonisation of Fiscal Incentives to Industry (Caribbean Common Market)	1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy
		1973 Treaty Establishing the Caribbean Community	1979 UN Draft International Agreement on Illicit Payments
		1976 OECD Declaration on International Investment and Multinational Enterprises	1979 UN Model Double Taxation Convention between Developed and Developing Countries
		1980 Guidelines Governing the	1980 The Set of Multilaterally

	Protection of Privacy and Trans border Flows of Person Data	Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices
	1987 Revised Basic Agreement on ASEAN Industrial Joint Ventures	1983 Draft UN Code of Conduct on Transnational Corporations
	1987 Agreement Among the Governments of the ASEAN Countries for the Promotion and Protection of Investment	1985 Draft International Code of Conduct on the Transfer of Technology
	1994 Protocol of Colonia for the Reciprocal Promotion and Protection of Investment in the MERCOSUR	1985 Convention Establishment the Multilateral Investment Guarantee Agency
	1994 Protocol on Promotion and Protection of Investment from States not Parties to MERCOSUR	1992 IBRD Guidelines on the Treatment of Foreign Direct Investment
	1994 APEC Non-Binding Investment Principles	1994 General Agreement on Trade in Services, Multilateral Agreement on Trade in Goods, Agreement on Trade-Related Investment Measures, Agreement on Trade-Related Aspects of Intellectual Property Right
	1994 Energy Charter Treaty	
	1995 Pacific Basin Charter on International Investment	

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

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

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

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

investment has existed since then. However, foreign investment and international investment law have evolved over time.

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

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

states have been seriously constructed, in the context of conflicts between developed and developing countries, especially Latin America[19].

The emergence of the "Calvo Clause" or "Calvo Doctrine"[20] severely shook the stability of foreign investment in developing host countries that adopted this doctrine, as this uncertain situation placed foreign investors at risk. International lawyers and scholars therefore sought to establish an international standard for legality of expropriation, that should be based on national treatment or non-discrimination, non-violation of specific undertakings, and on the ground of public purpose with due process of law and judicial review. This contradicts the traditional view of developing countries, which referred to provisions in domestic law[21]. However, it is generally accepted in international law that a state has a right to expropriate or nationalise a foreigner's properties, provided that such expropriation takes place on the ground of public purpose or public interest, without discrimination and with lawful compensation[22]. The legal requirement of compensation when expropriation takes place, according to the "Hull formula", must provide prompt, adequate and effective

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

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

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

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

compensation. However, this conflict was later on compromised by using the terms like "just", "full", "reasonable" or "fair and equitable" based on the fair market value or genuine value of the asset taken, by providing these terms in the bilateral investment treaties concluded between the host and home states. The loosening of the strict rule of the Calvo Doctrine was simply because foreign investment was needed in developing countries.

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

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

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or adequate, prompt and effective compensation.

stimulated other developing countries to promote foreign investment as discussed in chapter 1.

However, in the early stage of industrialisation in developing countries, there was still a firmly established fear that a new period of economic dominance would be ushered in by an unfettered flow of foreign investment, and that the entry of powerful multinational corporations would lead to external control of their economies instead of contributing sufficient economic advantages to the host states. Thus there was an increasing consciousness that the best way of resolving this dilemma was to admit foreign investment on a selective basis[23] and ensure that such investment promoted the economic objectives of the host state while earning profits for foreign investors.

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

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

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

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

The position of developing countries in attracting FDI was even worse when this happened in conjunction with the global trend of foreign direct investment, which increased concentration in developed countries, especially as the sectoral composition of FDI shifted toward tertiary industry (United Nations, 1993: 20). The global pattern of foreign direct investment can now be characterised as tripolar, with the EU, the United States and Japan being the members of the "Triad", as they are the largest host and home countries for FDI. In 1995, the Triad accounted for 85% of total outward stock and 65% of the total inward stock of FDI (UNCTC, 1991; UNCTAD, 1996b). Indeed, the share of FDI directed to developing countries has continuously declined from 26% in the mid-1970s to less than 20% in the late 1980s, and further declined to only 17% (amounting to US$ 32 billion worth of FDI flow) in 1990. The change is more dramatic in the case of Japan, which has traditionally invested a large share of its capital in developing countries. By the end of the 1980s, Japan directed 46% of its total outflows of investment to the United States and 20% to the European countries. As a result, Japan's position in developing countries declined from 42% of its own total foreign stock in 1986 to 34% in 1988. Even though in 1995 the inflows of FDI to developing countries increased to US$ 100 billion, only South, East and South East Asia continued to be the largest host developing region, with an estimated US$ 65

billion of inflows, accounting for two-thirds of all developing country FDI inflows, and some Latin American countries are the recipients of the rest[24].

A major reason for the increased concentration of FDI in developed countries is the shifts in sectoral composition of FDI in favour of the tertiary sector[25] (the service sector) which now has a more important role in the global economy as a result of the liberalisation of financial markets and services. As Japan, the United States and the European countries compete with each other in their large developed market, so they have to maintain their share of business and economic activities through their networks of TNCs and by huge investment there. Thus the growing concentration of FDI within the Triad and the development of regional networks of TNCs around each Triad pole has been matched by increased concentration of economic activity and trading within developed countries. This means that developing countries as a whole have to compete with each other for a relatively small share of foreign investment.

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

Apart from changes to internal laws and regulations, developing countries, especially the previous centralised-economy countries, have increasingly made

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

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

bilateral investment treaties with capital-exporting countries[26]. The reason for the treaty activity of these previous socialist countries may be to dispel perceptions that they are high-risk countries. Thus from the 1980s onwards one can see a surge of bilateral investment agreements concluded between host and home countries (UNCTAD, 1998b: 10)[27] to ensure the protection of foreign investors' properties in those countries and to promote foreign investment (as will be discussed in more detail in the next section). These treaties have been seen to boost investor confidence in the host state and, as a result, more investment flows can take place. This may be regarded as a factor influencing the locational decision of FDI, although not a decisive one compared to the other political and economic factors such as a favorable investment climate and environment attraction.

There are also increasingly bilateral investment treaties between developing countries, as some of them, the newly industrialised countries, become capital-exporting countries investing in other developing countries[28]. Then they have also concluded BITs between them, such as the treaties between Singapore and Sri Lanka, Thailand and Bangladesh, China and Vietnam, Korea and Malaysia, etc[29].

The competition for foreign investment among developing countries has

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

[27] UNCTAD (1998b) reports that "(D)uring the 1990s the number of BITs has increased dramatically. By the end of 1996 a total of 1,332 such treaties existed, of which 824 were concluded by developed countries.....The number of BITs concluded between developing countries and economies in transition has also increased dramatically during the 1990s, from 64 by the end of the 1980s to 508 at the end of 1996".

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

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

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

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

Thus the past half century has seen a sharp swing in the attitudes of countries towards FDI, and national investment regulatory regimes have evolved over time according to economic necessity, from protection to restrictions and control, to facilitation and liberalisation. Again, the rules of the game in today's world economy have changed. Now many of the investment measures that were mainly used in developing countries are regarded as trade-distorting measures (Moran, 1992b: 62-3) [30]. These measures were studied and their economic effects assessed by scholars and economists, especially in the United States, which was seriously concerned at this problem. Research has shown that investment measures have affected trade and investment flow (Guisinger and Associates, 1985). Thus trade-related investment measures are regarded as a kind of trade barrier to be eliminated. This brought about the inclusion of the trade-related investment measures issue into the agenda of the GATT Uruguay Round, and finally the Agreement on Trade-Related Investment Measures (TRIMs) was concluded. This was the first step to linking investment issues

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compilation of *Investment promotion and protection* (loose-leaf publication).

[30] Actually investment measures have been widely used in both developed and developing countries but the measures like local content requirements, export-performance requirements and local equity requirements are mainly used in developing countries and these are regarded as trade-distorting measures. In fact, the measures such as cash grants or tax breaks used in developed countries like the United States and European countries are also trade-related investment measures. For instance, European governments offer cash grants up to 60% of the cost of the entire investment to attract automobile, petrochemical and computer industry investment, while the United States have given as much as US$ 325 million per project or US$ 108,000 per job to foreign firms. It is incredible that average state expenditures in the United States to induce in ward investment and promote export has grown over the last decade by more than 600%: "It would be disingenuous to argue that such efforts are not trade-related investment measure", see Moran, 1992b: 62-3.

with trade issues within the umbrella of the WTO.

However, the development of the regulation of international investment was already taking place outside GATT since the 1960s under the scope of other organisations such as the OECD, the United Nations, UNCTAD and the World Bank. In the initial stage, attempts were made to elaborate on a comprehensive code and to introduce norms on the control of the conduct of multilateral corporations[31]. The rationale of this task was to liberalise international investment and to protect foreign investment. The most important reason behind the process was to create multilaterally agreed norms and to enhance an international rule-oriented regime in the international investment sphere.

3.3.3 The Interaction of Legal and Economic Factors in FDI Policy and ASEAN Open Regionalism

The discussion in the earlier sections shows the complex strands of the evolution of the economic and political factors shaping investment laws and policy of nation states. This section will analyse more specifically the interaction of legal and economic factors in FDI policy at the national level, and shows how this evolution of the interaction has influenced the process of ASEAN open regionalism, especially in the implementation of the ASEAN investment area. The discussion in chapters 1 and 2 has offered a clear picture of the ASEAN economic background and its interaction with the global economy. This chapter now focuses on the investment and FDI issues, i. e. the impact of the global economic and legal environment and the changes in ASEAN countries' national investment laws and policy. This leads to the process of development of an open regional investment area.

Economic theories on investment, and political ideologies, have influenced nation states in choosing their legal pattern and FDI policy (discussed below). Also

the legal factors and economic theories have contributed to the growth of TNCs in various aspects such as the ownership structure and legal form of TNCs, liabilities of TNCs, anti-competitive practices, and patent and trademark protection. Legal factors also influence locational decisions and internalisation of TNCs. Economic theories influence the legal choice of methods for controlling and regulating FDI i. e. screening FDI or restriction of FDI entry, reserving restricted investment sectors, managerial control, or on the other hand encouraging FDI by using investment incentives. Various legal patterns and FDI policy options have been chosen/adopted by countries depending on the economic theory/perspective that the country espoused. The economic theories/perspectives include[32]:

> i. the Neo-liberal perspective which favours an open market economy;
>
> ii. the Orthodox economic perspective which concerns TNC control policy;
>
> iii. the Marxist perspective which centres on monopoly capitalism and imperialism;
>
> iv. the Nationalist perspective which fears that large foreign firms undermine host state political and economic independence and threatens cultural identity so that states may impose control on TNCs;
>
> v. the Environmentalist perspective which concentrates on the ecological effects of TNC operation;
>
> vi. Global consumerism which concentrates on the creation and maintenance of long-term employment for the consuming public. Therefore employment stability is a policy consequence of furthering consumerism, given its faith in economic growth and increasing consumption.

Now we will look into national laws and FDI policies which are the result of such interaction, and from which the relations between states and business firms are formed, where the real activities of FDI take place. This reflects the influence of the economic theories upon the national laws that are based on the theory of control and regulation. Theories which emphasise control result in the state's designation of the legal form of investment by TNCs. Those which stress regulation, mainly entail regulating relations between states and enterprises, and consider that states should

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

evaluate the benefits that can be best obtained from allowing business firms to operate on their soil.

According to neo-liberalism, the market is the most efficient allocator of resources so it should be allowed to operate with as little regulatory interference as possible. This leads to a preference for an open international economy with minimum state or international regulation[33]. Foreign investment is regarded as an important source of capital, and FDI also brings to the host countries advanced technology, managerial skills, employment, and the improvement of production methods as well as competition that helps to up-grade local firms' operations. This perspective entails an open market economy, even though firms still could be subject to some restrictions (on the grounds of security, public order, health and other sensitive issues).

Beyond Neo-liberalism, a country adopting Orthodox economic perspective argues that markets can become imperfect allocators of resources because they are distorted by the costs of technology and the costs associated with the distribution of resources and products. Therefore such distortions must be eradicated by selective public sector interventions in the economy. For example, a large firm due to its size and technological capability can monopolise and distort product markets and undermine consumer choice through advertising and selling strategies, reinforcing its dominant position in the market. This requires selective and flexible state intervention/control to minimise market failures caused by such distortion. This may result in national laws requiring indigenous involvement in the ownership and control of local subsidiaries of foreign corporations, as well as for disclosure, accountability, and worker participation in TNCs. If state control is ineffective, measures of supranational control through regional and international organisation may be required

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[32] Muchlinski (1995: chapter 4).
[33] Muchlinski (1995: 93).

(Muchlinski, 1995: 94). For example the OECD Guidelines on Multinational Enterprises of 1976 were the product of negotiation between the OECD member governments and the Trade Union and Business Advisory Committees of OECD. This approach leads to the idea of "Corporatism", where the interests of capital, labour, and society interact through public bodies, composed of governmental, business and labour interests dedicated to national economic planning.

More restrictive measures are employed in Marxist perspectives, which emphasises the exploitation of labour by capital, and the global division of labour leading to imperialism, entailing the monopolistic control of markets. This emphasises the role of "core country" and "centre-periphery relations". The core country is considered to control peripheral economies through the function of financing and controlling investments, and through the managerial hierarchy i.e. through the hierarchical division of authority in the firm between the highest levels of management in the home country of the parent, intermediate management in regional sub-centres and the lowest levels of management in the branch plants located in the peripheral countries[34]. The extreme Marxist theory of the imperialist economy advocates withdrawal from the capitalist global economy in order to avoid interference and distortions due to flows of capital from outside.

The nationalist theory is concerned with national independence, self-determination and cultural autonomy. Consequently states may impose controls on TNCs that are not justifiable in economic terms and may even be damaging to the national economy. States may purchase or nationalise foreign owned assets, or by imposition of tariffs, taxes, subsidies or other instruments make foreign ownership of property less attractive, in order to have certain kind of production controlled by

[34] See discussion in detail in Brewer, A. (1990).

nationals rather than foreigners. Moreover, nationalism is concerned with the redistribution of national wealth, to increase the availability of high-income jobs for nationals or local ethnic groups. This strategy is espoused for example by Malaysia, where the government reserves a high ratio for "Bumiputra", the ethnic Malays, in ownership, employment, and management in the business sector, as well as of other benefits in society (discussed in chapter 4). Divestment, control over the main means of production, and exclusion of foreign investment from sensitive sectors are also measures applied to foreign investors by nationalist regimes.

The environmental perspective influences a country to take precautions in relation to the effects of international investment operations in the host country, to ensure adequate environmental protection. The principal regulatory concern that has been raised in this context leads to the development of corporate group liability for damage caused by environmental hazards under the control of TNCs[35]. Also this perspective encourages improved disclosure on environmental matters, and better compensation in the case of accidents. ASEAN countries also require TNCs to comply with their national environment laws, as a prerequisite for obtaining investment incentives (see discussion in chapter 4). This seems to develop a new general framework for the evolution of business activities and to influence the FDI policy of host countries.

Finally, global consumerism[36] favours the social and cultural effects of the expansion of global firms producing goods for private consumption. The influences of the increasingly global culture on life styles and consumption patterns that are distinct from the traditional and indigenous life styles and patterns in host countries, are fuelled by the role of transnational media and advertising corporations as the creators

[35] The matter was highlighted by the accidents at Seveso and Bhopal. See Cassels, James (1993), also see Baxi, Upendra (1986), and Baxi, Upendra and Thomas, Paul (1986).

of images changing consumer tastes to fit with the products and services offered by TNCs. This perspective affects nation states' FDI policy in two distinctive ways. On the one hand, a country may be aware of this negative impact of the changing life style and consumption patterns threatened by foreign cultural domination so that it may see fit to protect its cultural industries or even prohibit foreign ownership or screen out the entry of such investment. On the other hand, as consumer choices move towards the acquisition of globally marketed products, countries may encourage the continued development of global consumerism. In this way, a country may also support long term and stable employment. In this perspective, employment stability is considered to result from economic growth and increased consumption. Global consumerism, in contrast to environmentalism, encourages competition, free markets, and consumption. States may help enhance a high standard of employment and job creation to maintain high purchasing power, and welcome foreign investment.

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

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[36] See Sklair, L. (1991).

to non-ASEAN investors (discussed in chapter 5). Considered from this perspective, we need to examine ASEAN national laws, BITs, and the international investment regime (discussed in chapter 4) in which the interaction between ASEAN countries and TNCs occurs, to consider further how far ASEAN countries have developed their legal framework to accommodate the process of open regionalism. First, however, it is necessary to consider these aspects of the global regulatory regime that would affect the ASEAN legal framework governing FDI in the region. To this I now turn.

3.4 The Emergence of Global Regulatory Regimes in the Foreign Investment Sphere

In this section, I suggest a future trend of the global regulatory regimes in the foreign investment sphere and of the creation of normative rules to govern foreign investment activities. The discussion will focus on the factors facilitating the emergence of the new regime and will point to the problems of the current investment regulation framework. The move toward a multilateral regulatory regime has been fuelled by the changing global economic system and the role of TNCs, which have a crucial influence on the changes in laws and regulations as well as on the attitude of countries. On the other hand, it is the countries that would consent to the agreed set of rules governing international investment activities. This can be seen from the evolution and the development of the international investment framework as well as from the rationale for creating each form of such regulation. The existing investment regulatory regime has been attributed to the combined strands of the legal, political and economic system and the development thereof.

The emerging idea of creating multilateral regulation can already be found in the Havana Charter for an International Trade Organisation. For instance, Art. 11 and 12 of the Charter contained language that balanced "investor protection" against "decent conduct" provisions. The Havana Charter was drafted during 1946-48, but the

Charter never entered into force. Instead, the General Agreement on Tariff and Trade (GATT) which was negotiated and agreed during 1946-47 and provisionally applied since 1st January 1948 has survived, and has been reviewed several times[37]. As the GATT initially focused on trade issues and the reduction of tariff rates, the investment issue, which had been regarded as a non-border issue, and generally beyond GATT's umbrella was left behind. The bilateral investment treaty has become the alternative.

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

Since there is no global or central organisation regulating international investment, and because of the absence of a consensus to create multilaterally acceptable norms (Carty, 1991: 66), problems arising from these inadequacies were left to be solved by the parties concerned, which usually means between the host and the home states, and the transnational corporations. Actually they are the main players in the field of international investment. Thus they have mainly resorted to bilateral investment agreements, as these have enabled them to reach solutions in a flexible way and avoiding severe conflicts between them especially where host countries are developing states. In particular, as discussed in the previous section, they have embodied a compromise solution to the problem of compensation for expropriation[38]. The failure in bringing about a comprehensive code or multilateral investment agreement is largely because of the different ideology and conflict of interest between states. Thus the emergence of bilateral investment treaties has been regarded as a specific legal instrument seeking to solve the specific problem of international

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[37]. The General Agreement on Tariff and Trade was agreed during negotiations that partially paralleled the negotiations for a larger agreement, the Havana Charter that originally aimed to create the International Trade Organisation. This idea was developed in discussions during World War II on planning for reconstruction of the world trading system in the post-war period that all over the world had suffered from the destruction of the war.

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

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

The modern bilateral investment treaties are a rather recent phenomenon on the international investment scene as the first one was signed between the Federal Republic of Germany and Pakistan on 25th November, 1959 (Dolzer & Stevens, 1995: 1; Muchlinski, 1995: 618). However, before the emergence of BITs, treaties of friendship, commerce and navigation were concluded as the instruments for conducting bilateral economic relations between states[39]. The FCN agreements concluded among developed countries were quite successful but it proved difficult to conclude FCN agreements with developing countries, because the FCNs contained a wide variety of matters, including the right to enter, access to local courts, enforceability of arbitral awards, the right to engage technical experts, questions concerning the lease of land, tax issues, customs treatment of commercial travellers, treatment of products and consultations regarding restrictive business practices (Dolzer & Stevens, 1995; 10). This is because these agreements were primarily concerned not only with facilitating trade but related to foreign property, so the wide scope of the agreement had been thought to cover all issues concerned. Developed countries were concerned that the broad spectrum of close political, economic and cultural co-operation that was envisaged by FCNs was probably more appropriate for agreements between states of comparable economic stature. Furthermore, key features of traditional FCNs, like the unrestricted right to entry and the unqualified right of national treatment, were incompatible with the post-colonial political realities (Aksen,

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

1981: 357), reflected in various U.N Resolutions[40]. Thus the FCNs were viewed as an inappropriate instrument for bilateral economic co-operation and the BIT emerged as the preferred type of agreement for foreign investment protection.

Indeed, bilateral investment treaties reflected well that firstly, there has been a need for rapid development of the law in the area of international investment but such development was not forthcoming[41] because of the conflicts that were inherent in this area. Hence, states had to resort to the second best solution by making bilateral investment treaties to ensure that, at least, there would be some rules relating to foreign investment. Secondly, BITs were the result of state bargaining so it allowed some divergence in terms and definitions in BITs as well as in the practices of even a single state. Thirdly, the surge of BITs was the result of economic and political conditions. This can be seen from the period when BITs were concluded reflecting the surge of BIT where capital is needed.

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

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

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

into in the 1990s (UNCTAD, 1996b).

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

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

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

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

3.4.1.1. The Statement of the Purpose of the Treaty

Every bilateral investment treaty states the motives, objectives and circumstances through which a treaty can be seen in its proper perspective, specifically the reciprocal encouragement and protection of investment. (Dolzer & Stevens, 1995: 20-1). However, variations from the standard pattern have existed in various treaties. Some treaties may include a reference to reciprocal protection (BIT

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international plane", cited in UNCTAD, 1998b: 2.

between the Czech Republic and Hungary, 1993)[42] or to co-operation between private enterprises of the two countries (BIT between Belgium-Luxembourg and Bangladesh, 1981)[43]. Others have included a reference to the transfer of capital and technology (BIT between France and Hungary)[44]. The investment treaty between Switzerland and Turkey provided reference to international law or to the principles of international law as a basis for economic co-operation. A number of treaties concluded by Central and Eastern European countries have made reference to the Final Act of the Helsinki Conference to include obligations in the field of Human Rights. German treaties have frequently incorporated a reference to the benefits that may flow from the "contractual protection". But typical U.S treaties contain the commitment of the parties to fair and equitable treatment of investments[45]. These variations reflect the background of the relevant political, economic, historical and cultural consideration of each party to the treaty.

3.4.1.2. Definition of Investment

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

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

[43] See BIT between Belgium-Luxembourg and Bangladesh, 1981, Ibid.

[44] See BIT between France and Hungary, 1986, ibid.

[45] For detailed survey, see Dolzer & Stevens, 1995: 20-25.

over intangible property as such rights were dependent on the law of the host state for their recognition. (Verdross, 1931: 364).

But it became increasingly recognised that protection of intangible rights was essential and central to investment protection[46]. This began with concession agreements, which created contractual rights that were intangible. So a number of early treaties entered into following that period defined the term 'investment' in a broad general way, such as "the term 'investment' shall comprise all categories of assets including all categories of rights and interest"[47].

Modern forms of foreign investment treaty involve the transfer of intangible rights; licensing agreements, management contracts and consultancy contracts also have intangible assets as their subject matter. The definition of investment in modern BITs now tends to be as broad as possible, using a more elaborate formula, in order to dispel any lingering doubts that may exist from the early idea that intangible property is not property that is protected by international law.

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

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

- movable and immovable property and property right such as mortgages, liens and pledges;
- shares, stocks and debentures in companies and other interests in companies;
- claims to money or to any performance under contracts having a finance value ;
- intellectual property rights and goodwill, technical processes and know-how;
- business concessions including concessions relating to natural resources ("business concessions conferred by law or under contract, including concession to search for,

[46] It had begun recognised the intangible right since 1960s such as the dispute in the Carl Zeiss Stiftung Cases which litigated in England and elsewhere concerned trademarks. See Appeal Case (1967) 1. p. 853.

[47] See Dolzer & Stevens, 1995: 26. For example, they cited BIT between Germany and Sri-Lanka, at Art. 8 (1).

cultivate, extract or exploit natural resources" is the term in more recent BITs)[48].

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

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

- intellectual property which includes, *inter alia*, rights relating to :
- literary and artistic works, including sound recording;
- inventions in all fields of human endeavour;
- industrial designs; semiconductor mask works;
- trade secrets, know-how, and confidential business information; and
- trademarks, service marks, and trade names[49].

However, though 'investment' has been defined as widely as possible, many treaties confine the term investment only to investment approved by the state parties

[48] For instance, BIT between UK and Indonesia, Art. 1. Also see BITs between UK and individual ASEAN countries.

to the treaty. Some states require approval for all incoming foreign investment, others maintain an open door for all foreign investment but give special privileges only to investment that has secured approval. The approval is usually given only to such investments that are considered particularly beneficial to the host country and are subject to the satisfaction of conditions that might be imposed.

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

3.4.1.3. Criteria for Determining Nationality

BITs generally define the persons who may make an investment, and who may as a consequence enjoy the protection laid down in the treaty's substantive provisions. While some BITs use the term "investors", some treaties refer to "nationals", and in doing so draw a distinction between (a) individuals or natural persons and (b) companies and other juridical entities. These two categories of potential beneficiaries present distinct problems and will therefore be treated separately. Generally, states are free to choose the criteria that will determine an individual's nationality under BIT. Most BITs usually define "nationals" by reference to the parties' domestic laws on citizenship. The determination of juridical person's national is more complex with various approaches. Since the regulation of foreign investment mainly concerns juridical person, I will confine my discussion to corporate nationality.

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

1) the concept of incorporation or constitution, according to which a company is deemed

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

to be attached to the legal order under which it was incorporated, irrespective of the place and seat of its economic activities. This approach is preferred in the Anglo-American legal system. The rationale for this criterion is consistent with traditional international law[50];

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

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

The rules governing the attachment of a juridical entity to a state present some difficulty (Metzger, 1971; Reismann, 1971)[51], and a decision to rely on any one of the criteria may lead to different results. For instance, while the requirement of incorporation obviously leads to certainty, it may be outweighed by the fact that the place of incorporation may be no more than a formal or artificial link. Thus investors from third countries might stand to benefit from the treaty simply by incorporating their venture under the laws of a BIT Contracting Party. On the other hand, greater uncertainty may result from relying on the concepts of seat and control, though these criteria may be better suited to establish the true links of a particular company to a state. Some BITs have combined two of the above criteria in order to restrict the application of the treaty to companies that have indeed established appropriate ties with the home country. Other BITs refer to these criteria as possible alternatives, thereby broadening the scope of application of the treaty (Dolzer & Stevens, 1995: 36). These BITs specify that a company incorporated in one contracting party could be protected by the other party provided the seat of control of the company is located in the other contracting party or where there is control or substantial interests in the company by the nationals of the other party. In this manner, the treaty would ensure

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

[51]. See Metzger (1971) *Nationality of Corporate Investment under Investment Guarantee Schemes - The Relevance of Barcelona Traction.* 65 AJIL 532; and Reismann (1971) *Nationality and Diplomatic*

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

Though some of the BITs seek to grapple with the problem raised by corporate nationality, there is no consistency in the solutions adopted by them to give rise to a uniform principle. One can see a wide array of solutions in different treaties. The practices of even single states vary. For instance, the Singapore-United Kingdom Treaty[52] defines a British company as a company incorporated in Britain, whereas the Singapore-Germany Treaty[53] defines a German company as one "having its seat in the Federal Republic of Germany". British practice is also inconsistent on this point. Whereas the incorporation theory is preferred in the treaty with Singapore, the United Kingdom-Philippines Treaty [54]opts for a theory of control when it defines a protected company as one "actually doing business under the laws in force in any part of the territory of that contracting party wherein place of effective management is situate" (Art. 1 of the BIT between the United Kingdom and the Philippines).

Indeed, the definition of a corporate nationality in bilateral investment treaties

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Protection of Companies and Their Shareholders. Journal of World Trade Law 719.

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

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

goes against more traditional notions in international law, which lags behind the development of economic reality. The general rule relating to the diplomatic protection of corporations making investments in foreign countries was stated in the *Barcelona Traction* case[55]. According to that case, a corporation has the nationality of the state in which it is incorporated and only the latter state has the right of diplomatic intervention on behalf of the corporation[56]. The court referred to the growth of multinational corporations within the international economy and expressed surprise that there had been little development towards securing greater protection for investment by multinational enterprises.

3.4.1.4. Standard of Treatment

Treatment is a broad term, which in the context of BITs refers to the legal regime that applies to investments once they have been admitted by the host state[57]. This is an issue of considerable disagreement between states on the question of what treatments are generally accepted. In the past, as discussed above, there were two main principles asserted by states. One is the minimum standard of treatment, which was invoked by capital-exporting countries. The recognition of a minimum standard of treatment permits international scrutiny of the treatment of the foreign investor by the host state. The other is the national standard of treatment espoused by developing countries, especially Latin American countries. The principle of the national standard of treatment under "Calvo Doctrine" was that the protection for the foreign investor

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November 1999)

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

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

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

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

should not be better than that given to the domestic investor[58]. The developed countries rejected this principle, as the treatment by some countries was lower than the minimum standard expected by the capital-exporting countries.

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

As there have been differences in the standards of treatment of foreign investment, states have sought to agree on the standard of treatment that they would accord to the investment of their nationals in bilateral investment treaties. There are four different devices used in BITs. Firstly is "fair and equitable treatment" principle to be accorded to the nationals of the contracting parties. This phase is vague and open to different interpretations[59]. It permits treatment that reaches the standard of fairness and requires that all foreign investors be treated equally.

Second is "full protection and security". This phrase is also difficult to give an exact meaning because it stems from a lack of clarity, as in fact, the origin of the phrase came from the FCN treaties which were less detailed than the modern BIT. A number of BITs have followed the OECD Draft Convention and have combined the

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

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

principle of full protection and security with the principle of fair and equitable treatment by providing that full security and protection shall be enjoyed "in a manner consistent with international law".

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

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

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

accords to nationals and companies of any other country.

The majority of BITs combine the MFN and national treatment standards so that the nationals of either state may claim the more favourable standard of treatment. In several BITs the reference to national and MFN treatment is complemented by the phrase "whichever is more favourable"[60]. Some treaties combine these standards in one clause with other standards of treatment such as fair and equitable principle or full protection and security.

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

3.4.1.5. Repatriation of Profit

The main objective of all foreign investment is to make profits and repatriate them to the home state. If repatriation of the profits is prevented by the host state this purpose of foreign investors would be frustrated. Many BITs contain absolute statements protecting the right of repatriation. This is unrealistic, as problems will arise when a contracting party has foreign exchange shortfalls necessitating currency control. However, many BITs address this problem and provide exceptional clauses according to the financial crisis of the contracting parties. Many of the British treaties provide that the right of repatriation of profits may be restricted "in exceptional

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

economic or financial circumstances"[61]. The repatriation clause will usually include not only the profits that are made but also all other payments such as fees or other entitlements that are paid to the alien[62]. But if the property of the national is taken over and compensation is paid, there may be separate provision made for the repatriation of such compensation.

3.4.1.6. Nationalisation and Compensation

Nationalisation poses the greatest threat to foreign investment. Capital-exporting countries have sought to circumscribe the right of a state to nationalise foreign property by regarding at least certain types of taking of alien property as unlawful. Under international law a state has the right to nationalise foreign owned property provided certain conditions are met, namely that the taking of the investment is done for public purposes[63], in accordance with the law[64] and against compensation [65]. There is broad agreement that the right is subject to the payment of compensation. The treaties also seek to indicate that the provisions relating to expropriation apply not only to outright taking but also to "creeping expropriation", or the slow erosion of the alien's ownership rights through regulatory measures.

It is the issue of compensation, particularly the amount of payment, which is

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

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

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

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

[65]. The draft UN Code of Conduct on Transnational Corporations contains the following clause: It is acknowledged that States have the right to nationalise or expropriate the assets of a transnational

the most contentious and controversial. Capital-exporting states, particularly the United States, have steadfastly adhered to the standard of "prompt, adequate and effective compensation", the "Hull formula"[66], as the standard of compensation that has to be satisfied in the event of nationalisation. The standard would require, at the very least, the payment of the full value of the property that had been taken over. The developing countries have collectively articulated the standard of "appropriate compensation". They asserted that it would be a flexible standard that would permit a state to take into account factors such as the profits made by the foreign investor, the duration of the period during which profits were made and similar factors in assessing the compensation. Developing countries have also expressed the view that the tribunal of the host state should be the sole arbiters of the amount of compensation.

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

One can see that there are wide divergences in bilateral investment treaties. But given the uncertainty that exists in international law on foreign investment, bilateral investment treaties will be looked upon as the best way of securing

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corporation operating in their territories, and that adequate compensation is to be paid by the State concerned, in accordance with the applicable legal rules and principles.

[66]. In 1983, U.S. Secretary of State Hull declared in correspondence to the Government of Mexico that "under every rule of law and equity, no government is entitled to expropriate private property, for

investment protection between parties. And this is the reason why BITs are currently accepted and increasingly concluded between states.

3.4.2 From Bilateral Investment Treaties to a Multilateral Investment Agreement?

Bilateral investment treaties (BITs), like other treaties, may lead to the creation of customary international law if the same standards of investment protection and other aspects of the agreements form a consistent or uniform pattern. But in the case of investment agreement, it seems the states making such treaties create *lex specialis*[67] because of the uncertain state of existing international law on foreign investment, as well as variations in legal systems, legal ideology, conditions and bargaining between the parties concerned[68]. Especially most bilateral investment agreements refer to domestic law and also are often subject to provision in the domestic legal systems, and are prone to be interpreted differently by national courts. Thus the differences in formulation reduce the opportunity for common standards emerging from such treaties [69], because the diversity of the investment agreements causes differences in standards and practices among each party to those agreements. The absence of standard norms may allow TNCs to gain advantages from "treaty shopping". Even if every state agrees to conclude bilateral investment treaties with each other for governing foreign investment, thousands of BITs would have to be signed. And thus under the current situation the same country may have different practices in relation to different parties depending on the bargaining position and legal system of each party, e.g. the problem of different definitions and identification of corporate nationality. Some rely on the

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whatever purpose without provision for prompt, adequate and effective payment therefore".

[67] Salacuse, J. W. (1990) "BIT by BIT" *International Lawyer.* 24 issue 655. p. 660. Salacuse stated that the purpose of the treaties was to establish "specific legal rules" as between the parties.

[68]. See Muchlinski, 1995, chapter 17, p. 639. and Sornarajah, 1994, chapter 6, p. 227.

[69] Sornarajah, M. (1986) "State Responsibility and Bilateral Investment Treaties" *Journal of World Trade Law* No. 79. He argued that "despite of the growth in the number of bilateral investment treaties, there has been no reason to change this conclusion.... It is premature to regard these treaties as creating customary law".

criteria of incorporation or constitution, some regard the seat of the corporation, and some determine the nationality by judging the control of the corporation. In addition, differences in the definition of investment have resulted in differences in protection right coverage.

Therefore, some have argued that bilateral investment agreements are insufficient in the integrated global economy that needs an agreed set of standards and rules to regulate international investment activities. Even though BITs have been increasing and supposing that countries will accept the same standard and rules to be incorporated into the BITs, this does not mean that BITs are suitable instruments governing international investment. Hence, it may be time to re-think a suitable regulatory regime in this field. Instead of concluding thousands of BITs, should states turn to the agreed set of rules governing international investment, which nowadays is becoming a globally integrated network? The problem is how to create a proper multilateral investment agreement that is appropriate to the global economy. The difficulties involved have been revealed by the failure of the OECD countries to reach agreement on the proposed Multilateral Agreement on Investment (MAI) even after seven years of negotiation up to 1998.

Recently, OECD countries worked on drafting a multilateral agreement on investment to provide a strong and comprehensive multilaterally legal framework, rules and regulation for international investment in order to facilitate the global freer investment regime, to assure non-discriminatory treatment and to protect foreign investment. In other words the MAI sought to minimise or eliminate barriers to foreign investment and also widen the scope of existing liberalisation and provide legal security for international investors. The proposed Agreement aimed to 'level the playing field' and ease market access, essentially by embodying the principle of

national treatment and most-favoured-nation treatment in the context of a multilateral investment agreement.

The existence of regional grouping in various parts of the world that implemented economic integration enhance the possibility of creation of common standards of regulation of foreign investment that gradually harmonises the fragmented practice and different principles espoused by different countries. For instance, ASEAN countries entered into an ASEAN investment agreement; NAFTA member countries are bound by chapter XI of the NAFTA agreement, which covers investment issues. The EU has implemented deep economic integration. The wide existence of regional investment agreements means a narrowing of the regulatory differences among nation states.

It was considered appropriate to negotiate a MAI at the OECD and between developed countries, because they are host and home countries of international investment that accounts for two-third of the world investment flows. This would however influence and inevitably affect the rest of the world, especially when investors from developed countries require the same rules and standards implemented world-wide. If any developing host countries lack high standards of investment protection or do not comply with the rules and regulation of MAI those countries may be disadvantaged in determinants of foreign investment. This important impact on developing countries would have forced them to accept the MAI in the end, even if most of them were not participants in the negotiation.

3.5 The Proposed Multilateral Agreement on Investment (MAI)

It is important to analyse the background and substance of the Multilateral Agreement on Investment, even though it was ended in the OECD, as it may be revived under WTO because of the strong support of especially of the EU and Japan. Secondly I

suggest the reform and revision of the MAI for coping with the problems that might be encountered by host countries, especially the weak countries. And finally I conclude that the global economy needs a new international investment regime and a proper global regulatory framework to regulate international investment. ASEAN may gain advantages from this revised framework agreement and it could be used as an investment instrument by ASEAN countries in implementing the AIA substituting the current ASEAN BITs.

3.5.1 Background to the MAI

The MAI was developed by the OECD states, in particular the European Commission, EU member states, the US and other industrialised countries. They wanted more extensive rules on foreign investment than those recently agreed under TRIMS and GATS of the WTO. They were also keen to see the MAI extended to developing countries, and eventually being used as a model for future rules in the WTO[70]. But many developing countries were highly critical of the MAI, as they saw it as an abrogation of their sovereignty. They are also strongly opposed to it being discussed in the WTO, which they see as being dominated by developed countries. They believe that, if investment issues are to be discussed, it should be done in a body in which the voices of developing countries are stronger, such as UNCTAD, because the mandate of this organisation is to discuss development issues, and has included regulation of investment and TNCs. It could also be done by a joint effort of UNCTAD and the WTO, or by setting up a new forum/institution.

The declared rationale for the MAI was to free foreign investment and to protect foreign investors by asserting national treatment and the most-favoured-nation

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[70]. As a 1996 paper by the International Chamber of Commerce stated "The preponderance of restrictions on foreign investment is outside the OECD area....Business needs the benefits of an international regime to include the fast growing countries of Asia, central and eastern Europe and Latin America".

treatment so that foreign investors will be treated equally both among foreigners and between them and local investors. A comprehensive set of multilateral rules for investment provided for:

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

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

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

3.5.2 The Content of MAI and its Implications

3.5.2.1 Definition of Investment and Investors

MAI defined investment very broadly to include any kind of property or contractual right to assets or money, owned directly or indirectly by the investor[71]. This would include, for example, claims to intellectual property, financial derivatives, and possibly real estate. Investors[72] covered by MAI were nationals or residents of

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

[72] . Art. II, sub 1 investor means: (i) a natural person having the nationality of, or who is permanently residing in, a Contracting Party in accordance with it applicable law; or (ii) a legal person or any other entity constituted or organised under the applicable law of a Contracting Party, whether or not for

member states, or any legal entities as companies formed under their laws. Assets would be protected if owned or controlled by such investors whether directly or indirectly owned. The inclusion of indirectly owned assets would cover capital routed through a company incorporated in a tax haven or an offshore financial centre, even one with lax regulation and strong secrecy. Thus, for instance, MAI would protect speculation in financial derivatives by hedge funds incorporated in tax havens, like the Bahamas, if its shareholders are residents of an MAI member country[73].

Regarding investors' rights, the MAI strongly protected such rights in legally binding form, backed by direct access to international arbitration. Many considered that this would bring international law into the service of the powerful and economically strong, while the poor and economically weak were entirely neglected. It failed to balance the granting of rights with any acknowledgement of responsibilities for social improvement, human rights or the protection of the natural environment[74].

3.5.2.2 Dispute Settlement Mechanism

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

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profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, joint venture, association or organisation.

[73] Oxfam (1997) Oxfam briefing paper "The OECD Multilateral Agreement on Investment (MAI)". Mimeograph.

[74] See Picciotto, Sol and Mayne, Ruth (eds.) (1999) *Regulating International Business Beyond Liberalisation.* London: Macmillan Press. (See chapter 4, 5 and 6).

economic policy legally and validly established will be overridden by the rights created by the MAI.

3.5.2.3 National Foreign Investment Laws and Regulations

If MAI had been agreed, it would have removed virtually all remaining national policy tools for regulating foreign investment. Obviously, this would restrict the ability of governments to regulate foreign investment for the common good in the same way as before, mainly geared towards supporting national economic policy and development plans as well as focusing on the development of key areas, both geographical and of business sectors. Moreover, unlike the GATT, MAI does not contain any general exceptions from MAI rules (general exceptions would exclude specific kinds of government measures, which in the MAI were mainly limited to national security and perhaps public order)[75]. Instead, the MAI allowed only country-specific exceptions, which required contracting parties wishing to preserve their sovereignty to regulate specific area of laws to identify any such measures that deviate from the MAI's NT and MFN obligation. These exemptions must be negotiated and agreed with the other contracting parties prior to signature or accession. Country specific exceptions are subject to "standstill"[76]. Therefore MAI did not provide an effective "exceptions clause" for national laws to protect matters such as human rights and human or animal health and the environment[77].

This is a very important issue for developing countries as they are weak *vis-à-vis* powerful TNCs[78]. Their ability to impose control is vital to prevent TNCs expropriating excessive economic benefits from investments in these countries and to

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[75] . See Picciotto, Sol and Mayne, Ruth (eds.) (1999: 95-96).
[76] . See Picciotto, Sol and Mayne, Ruth (eds.) (1999: 95, 128).
[77]. See Picciotto, Sol and Mayne, Ruth (eds.) (1999) chapter 4, 5, 6, especially see the discussion on the Country-Specific Exception and the Non-Lowering of Standard clause p, 76.
[78] . This is due to the high need of capital, and also their poverty may make them vulnerable to the problem such as corruption. Moreover, they might accept the "race to the bottom" policy to lax laws

help them compete on more balanced terms in highly unequal global markets. Thus the abrogation of host developing countries' sovereignty to regulate foreign investment could be a serious problem for their economies and particularly their people. Powerful TNCs can often escape from their responsibilities to victims of disasters from wrongful operations and evasion of domestic laws. The Bhopal case in India was an example[79].

In addition, the fierce competition for FDI among developing countries to attract inflow capital makes them relax laws and regulations to pamper foreign investors. It is even worse when this situation combines with corrupt officers who ignore the breach of laws and also the lax enforcement of laws and regulations[80]. All these factors could further exacerbate the poverty of developing countries.

3.5.2.4 National Treatment and Most-Favoured-Nation Treatment

The declared objective of MAI was to ensure that governments treat foreign-owned and nationally-owned investors equally. The national and MFN treatment principles would apply to the acquisition, establishment and operational activities of all investors. This sounded fair, however MAI went beyond these principles and provided elaborate legal provisions giving special treatment for investors. They were to be given treatment "no less favourable than" nationals of the host state, this allowing the continuation of special privileges such as investment incentives and tax breaks.

A very sensitive issue was that the MAI would have eliminated most restrictions on foreign investors entering sensitive sectors. Almost all ASEAN

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and regulations for attracting inflows of investment or in other words to pamper foreign investors.

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

[80] . Their poverty may make them vulnerable to problem such as corruption, which generally occurs in

governments have restrictions on foreign ownership of key industries or sensitive sectors, or require approvals for such acquisitions, or insist that they be carried out as joint ventures with local investors or government bodies. And most FDIs are subject to screening measures to prevent entry of harmful FDI and to protect essential national interests, social values, culture and national heritage for the nation. These include preserving indigenous professions, fishing stocks, agriculture, natural resources, etc. that need to be carefully managed for the long term benefit of local people and not exploited for short term gain by TNCs. Even developed countries also protect their interests where they are considered to be harmed by FDI[81].

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

3.5.2.5 Performance Requirements

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

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poor developing countries.

[81]. For example, the UK requested an exemption from the MAI on broadcast media and France sought

On the other hand, foreign investors are to be given the right to bring in essential employees, which can be broadly interpreted to cover "who is essential to the enterprise"[82]. Investors can also employ whomever, regardless of nationality. This will override national labour and immigration laws. Presently, developing countries have requirements that investors must employ a certain proportion of locals or train local people to take over from foreign specialists, but such requirements would have been threatened by this provision. This alarmed developing countries of the potential threats of unemployment problems, and undermining of transfer of technology, management expertise, technical operation skills and other advantages that host countries should obtain from FDI.

3.5.2.6 Protection and Compensation

States would have been obliged to provide full and constant protection and security to foreign investors and also to provide compensation in the event of nationalisation or any kind of expropriation affecting property rights. The wide meaning of "measures having an equivalent effect" may cover taxation, and some environmental regulations. The right to compensation could override the state's right to tax. Compensation was to be at full market value plus interest in convertible currency even though the assets may have been bought at below market prices. Foreign investors have the right to freely transfer any derivatives from investment including dividends, interest, and all types of payments. Absolute freedom for investors and speculators to move funds causes major problems for individual countries[83] and can also be destabilising regionally and even globally. This needs more concerted international effort to restrict damaging flows of short-term and

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protection from overseas investment, especially from Hollywood, in their film industries.

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

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

speculative funds. The regulation of financial markets and activities is essential. Developing countries with weak legislation and enforcement mechanisms are particularly vulnerable to unscrupulous investors.

3.5.2.7 Taxation and Restrictive Business Practice

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

3.6 Revision of the MAI

3.6.1 Voice from Developing Countries

Since MAI would have been a new form of global regulatory framework for conducting foreign investment in the integrated global economy, it inevitably involved nation states including developing countries. Despite the failure to reach agreement at the OECD, several states have now proposed a modified version to be negotiated at the WTO. It has been argued that the global integrated production systems and management of TNCs networks cannot function well in a fragmented regulatory framework. On the other hand, it is more difficult for nation states to control and regulate global TNCs with different standards of treatment. In addition, if TNCs from OECD countries, which govern more than 80% of world investment and cover more than 70% of world trade, can enjoy higher standards of protection and more freedom of establishment and operation in host developed countries, the proportion of FDI

flowing to developing countries may decline even further. Given the power of TNCs and the need of developing countries for capital, it is not difficult to press those developing countries to accept a MAI. Under these circumstances developing countries should have more role in shaping the "agreed set of rules" in the international investment laws. The broadening of the MAI consultative process to include developing countries government and relevant non-governmental actors is essential. This would allow representatives of those people affected by international investment decisions to voice their concerns directly.

3.6.2 Legal Right for Citizens and Communities, Responsibility of TNCs

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

Moreover, a desirable MAI should protect the right of the people affected by investments such as workers, consumers and communities where factories are located. The reason MAI should protect these rights is because MAI should balance the rights

and responsibility of TNCs, and the responsibilities of TNCs towards host states and/or their people affected by TNCs' operation should be clearly defined in the MAI so that the victims can directly and equally exercise their rights based on the same legal instrument. If the victims need to seek solutions by other means or need to refer the case to other legal instrument or procedure, it would be difficult to jointly enforce such different legal instruments for the same case. And this would be a lopedsided legal development of MAI[84]. Unsafe working conditions, dangerous products, and pollution may be caused by the operations of TNCs, which need their responsibilities to be properly dealt with. Since the MAI creates rights for investors enforceable both under local law and by international arbitration, local people also need to be given the right to bring claims directly against the investor. They should also be given the right to present their cases to any tribunal considering a state-state or investor-state dispute, either as affected persons or as representative organisations. This will ensure the right of the person affected by foreign investment to seek remedy from investors.

3.6.3 Sovereignty of Government to Regulate Foreign Investment for the Public Good

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

3.7 Conclusion: How to Respond to the Changing Global Economy and Regulatory Regime

Foreign direct investment plays a particularly important role in facilitating an international division of labour that takes advantage of international trade

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

opportunities. It does this because it increases the mobility of factors of production; not only capital but also, probably more importantly, technology, managerial skills and other know-how. It also brings with it market access for exports of components to global production systems and for exports of finished products to distribution system. Thus, the global liberal international investment and trading regimes are a complementary and mutually reinforcing engine for the generation and distribution of wealth and incomes more evenly around the world.

The growth of inherited assets and technological progress, which are the main ingredients of economic growth, are raising the created-to-natural asset ratio of economic activity. Simultaneously, because of the imperfections in the markets for created assets, the relative significance of transaction costs to production costs (discussed in section 3.1.2) is increasing and because of the rising costs of creating new assets and the increasing competition for global markets, firms are being compelled to globalise their value-added chains, including the sourcing of their inputs and the sale of their final products.

The important concern here is how ASEAN states should respond to the changing global economy and regulatory regime for foreign investment: the emerging new WTO rules such as GATS and TRIMs, and especially the emerging MAI. This signals to ASEAN countries the need to re-evaluate their current national investment laws and economic policy to cope with the difficulties they might encounter. They have to consider these factors together.

The changing global economic and legal environment as well as its closed economic ties with the countries outside the region prompt ASEAN countries to liberalise investment at a regional level to accommodate the new pattern of the international integrated production system fuelled by the TNCs. In order to facilitate

the implementation of ASEAN open regional investment area, ASEAN countries need to liberalise their investment regime correspondingly. Therefore, their national investment laws and regulations as well as ASEAN BITs, which are the international legal framework governing foreign investment, need to be changed/developed. Especially, ASEAN BITs, like other BITs, are *lex specialis* and their terms and conditions vary considerably. In this context, ASEAN countries retain considerable flexibility in deciding on the pace and extent of "opening" to foreign investment. However, the emergence of the proposed MAI implies that ASEAN may need to change their investment laws more dramatically to comply with it.

In conclusion, to respond to the changing global economy, ASEAN countries have to improve their "created" as well as "natural" assets because they are the determinants of FDI. To respond to the emerging global regulatory regime for foreign investment, ASEAN countries have to balance liberalisation, competition and responsibility of foreign investors.

In GATT/WTO, ASEAN countries need to take a greater role in the revision of the TRIMs and GATS as well as in the creation of international competition rules that would be included in WTO in the next round of multilateral negotiation. Seen from the global scenario in both legal and economic aspects, ASEAN countries need to strengthen their investment regime to include competition laws in order to ensure advantages from liberalisation (discuss in chapter 6). The next chapter will analyse the investment regime of ASEAN countries, bilateral and multilateral investment agreements concluded by these countries for evaluating legal environment for FDI in the region in order to improve ASEAN investment laws and regulations, also to consider how do national laws of ASEAN countries actually further the process of open regionalism.

Chapter 4

The Investment Regime in ASEAN Countries[1]

Introduction

The analysis in chapter 3 offers a clear picture of the interaction of legal and economic factors in FDI policy, and the international investment regime, focusing on BITs and the emerging concept to establish multilateral rules governing international investment in the form of a MAI. Within these episodes of evolution and development ASEAN countries have gone through the process of FDI policy changes and legal adjustments to accommodate the changing global legal and economic environment. The pace of investment liberalisation taken by these countries was clearly influenced and affected by the interaction of legal and economic factors in the international sphere, and by a combination of their economic relations outside the region and their own economic policies.

In this chapter, I will focus on analysing ASEAN countries' investment regimes i.e. national investment laws, BITs, and regional investment agreement based on the theoretical background analysed in the previous chapter. This will show how national laws of the ASEAN countries actually further the process of open regionalism, or how they need to adjust their laws and policies in order to facilitate the achievement of such aims. I will firstly discuss the ASEAN countries' national investment laws followed by the analysis of the actual ASEAN BITs entered into with the European countries and the US, the main home countries of inflow investment to the region, and compare them with the ASEAN regional investment agreement. The comparison among the ASEAN BITs, and also with ASEAN regional investment

[1] The analysis in this chapter is by the author based on the compilation of ASEAN laws by various sources i.e. CCH Asia, APEC, ESCAP and ASEAN Secretariat. There is a paucity of up-to-date

agreement emphasises the nature of the BITs as a *lex specialis* that allows flexibility of ASEAN countries in liberalising investment. However, as mentioned in chapter 3, the feasibility of a MAI prompts ASEAN countries to adjust their laws and policy to comply with its standard if ASEAN countries would accept a MAI that would establish a new and higher multinational standard of investment liberalisation and protection. This might be seen as an instrument accelerating the process of open regionalism.

Since the 1980s ASEAN countries have embarked on significant reforms of their investment regimes. These investment liberalisation initiatives were undertaken unilaterally[2]. They have occurred due to the recognition of the benefits of a degree of liberalisation and competition in response to change in the international climate, rather than due to the requirements of regional or international agreements. However, by 1995 ASEAN countries were conforming to the Agreement on Trade-Related Investment Measures (TRIMs) to eliminate trade-related performance requirements. Controls of FDI in ASEAN countries, however, remained quite extensive and complex[3]. The policy instruments include the following:

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secondary literature in this topic.

[2]. All ASEAN countries gradually liberalise investment regulations step by step, aspect by aspect, and sector by sector without entering into any agreement for each liberalisation at the time. For instance, Indonesia launched various liberalisation packages: the January package of 1984: tax reform; the April package of 1985: shipping and customs reform; the May package of 1986: import and investment reform; the October package of 1986: sole importer and duty reform; the December package of 1987: opened up the tourism sector to foreign investors and relaxing the extension of divestment programme and relaxed the equity share of foreign investors in joint venture companies which export at least 65% of their production; the October and December package of 1988 : banking, capital markets, import and export reforms; the policy of May 1989: re-issued negative list which more open; the May of 1990: simplification of licensing and permit procedures; the June package of 1991: trade and investment reform; the July package of 1992: investment, trade, financial and manpower reform; the May package of 1993: banking reform; the June package of 1993: trade, industry and investment reform; the October package of 1993: trade, investment and environment; and the June package of 1994: simplification of the license and permit procedures.

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

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

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

Table 1 summarises the regulations of FDI in ASEAN countries and shows the main characteristics of investment regulations of these countries, on which the analysis of ASEAN national investment laws is based.

Table 1

Summary of the Regulations of FDI in ASEAN Countries

Countries/Laws	Limitation of Ownership	Restriction on Land Ownership	Restricted Sector	Performance Requirements	Tax Incentives
Indonesia Law No. 1, 1967 Law No. 11,1979 Law No.6,1968 Law No.12, 1970 Govt regulation, Presidential Decrees, Ministerial Regulations, Decision, Decree of Investment Co-ordinating Board (ICB)	subject to negative lists (Law No.1 of 1967, Decree No. 54 of 1993, Foreign Investment Act 1994)	three types of land rights available (Presidential Decree No. 34 of 1992)	23 restricted sectors and 12 prohibited sectors, including retail and wholesale trade, radio and television broadcasting (Presidential Decree No. 54 of 1993, Foreign Investment Act 1994)	local content requirements and export performance requirements in various sectors (Presidential Decree No. 54, 1993, Decree of the Ministry of Industry No. 114/M/SK/1993, Decree of the Ministry of Finance No. 645/KMK 01/1993)	priority sectors, Pioneer Industries (Law No. 6, 1968, Act No. 12, 1970, Guidelines of the Capital Investment Co-ordinating Board
Malaysia The Promotion of Investment Act (PIA) of 1986, The Industrial Co-ordination Act (ICA) of 1975, revised in 1986, MITI Regulations, The Foreign Investment Committee Guidelines(FIC)	depending on proportion of production exported (ICA 1975, MITI regulations)	No restriction (except for some threats to environment)	certain parts or components industries (ICA 1975)	local content requirements in motor vehicles, export requirement depending on level of foreign equity (ICA 1975, MITI regulations 1991)	Pioneer Status, depending on local content linkages, value added, MTS ratio, export oriented manufacture, technology, R&D and HRD (The Promotion of Investment Act, 1986, Malaysian Income Tax Act, 1967 (MITA)
Philippines Foreign Investments Act of 1991 R.A. 7042	subject to negative lists (Foreign Investment Act of	Lease right, up to 75 years, hold land subject to approval and	retail trade, mass media, engineering, rice and corn	local content requirement, export performance	Investment incentives Tax and Non-Tax incentives

as amended by RA 8179	1991, Second Regular Foreign Investment Negative List pursuant to executive order)	conditions (the Investors' Lease Act of 1993, President Decree No. 1648)	production, defence related activities, small and medium-size domestic market enterprises, import and wholesale activities Foreign Investment Act of 1991, Nationalisation Laws and Other Requirements, Various Republic Acts (RA), Constitution))	requirements and technology transfer requirements in certain sectors, including motor vehicles (the Car Development Program, Commercial Vehicle Development Program, the Motorcycle Development Program	(The Omnibus Investments Code of 1987, RA 6810, BOI's Official Order No. 6 of 1993),Executiv e Order No. 470: Tariff f Reform of 1991)
Singapore Company Act, The Business Registration Act, Acts under administration of Economic Development Board	generally there is no restriction except in banks, air lines and shipping (Company Act, the Banking Act, Monetary Authority of Singapore Act)	No restriction	arms and ammunitions manufacture, electricity, gas, and water, newspaper publishing, airlines and shipping (the Control of Manufacturer Act, and the National Security Act, the Banking Act)	No performance requirements	Pioneer Status, Package of tax incentives (Economic Expansion Incentives Relief from Income Tax Act, Income Tax Act
Thailand Investment Promotion Act B.E. 2520 (1977) amended by the Investment Promotion Act (No. 2) B.E. 2534 (1997), the Alien Business Law of 1972	in restricted sectors or if less than 80% of output exported (permission of the Board of investment Promotion, permission of the Ministry of Commerce, Civil and Commercial Code, Investment Promotion Act	Generally foreigners are not allow to own land unless promoted by the Board of Investment (Land Code, the Condominium Act, the Investment Promotion Act, Petroleum Act of 197, and the Industrial Estate Authority of Thailand Act)	banking and finance, insurance, certain public utilities and military goods, agriculture, animal husbandry, fishery (the Alien Business Law, 1972, Commercial Banking Act, 1962, Act on the Undertaking of Finance Business, Securities Business and Credit Foncier Business, 1979 and the Securities and Exchange Act, 1992, Life Insurance Act, 1992 and the Casualty Insurance Act, 1992, Thai vessel Act, 1971	local content requirements in motor vehicles, pasteurised and skimmed milk, and various other manufacturing industries, domestic sales and export requirements in certain sectors (the Factory Act (B.E. 2535), The Investment Promotion Act (B.E. 2520)	Tax and Non-Tax Incentives (Investment Promotion Act, 1977, 1997, BOI announcement, BOI Guidelines: Criteria for granting Tax and Duty Privileges for promoted Projects, 1993, Revenue Code)

Source: Compiled by the author from national legislation.

ASEAN countries still maintain an approval procedure for foreign investment, but they have mostly introduced the 'one stop service' concept and implement strict time limits to process applications. Some have enacted new laws that explicitly welcome FDI. Indonesia eliminated the minimum capital requirement, introduced a 'one stop service' and a greater regional autonomy for approval. Malaysia introduced

a Promotion of Investment Act[4]. The Philippines enacted a new foreign investment law[5], and Thailand has permitted the foreign ownership of land[6]. I will deal with the different types of controls separately, although there is inevitably some overlap in practice. The following sections will focus on ASEAN national investment laws, country by country, to provide the actual national laws and regulation governing foreign investment. The four main areas are discussed i.e. entry approval procedure, company administration and control; ownership limits and restricted sectors; performance requirements; and investment incentives. I will firstly make a survey of all actual ASEAN countries' national laws and regulations. We will find that the pattern of ASEAN national investment laws, and the rationale behind such laws and regulations are all the same that are also based on the same economic theoretical approach (discussed below). I will provide an analytical conclusion at the end of these sections.

4.1 Entry Approval Procedures, Company Administration and Control

ASEAN countries have long had a policy of screening foreign investments in order to

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[4]. The Promotion of Investment Act 1986 provided an investment promotion package for foreign investors such as Pioneer Status for the company, Investment Tax allowance, Industrial adjustment allowance, Abatement of adjusted income, Export allowance, Export Credit Refinancing Scheme, Double deduction of expenses for promotion of exports, Double deduction of export credit insurance premiums, Industrial building allowance, Incentives for research and development.

[5]. Foreign Investments Act of 1991 R.A 7042 as amended by R.A 8179.

[6]. Foreigners (and even Thai ladies married to a foreigner) may not own land outright, but only limited rights (e.g. a 30-year lease). However, the Land Code provides that aliens may acquire land by virtue of the provisions of a treaty giving the right to own immovable properties and subject to the provisions of this Code, and subject to limitations on rights over land for religious purposes. Under the 1999 amended Land Code aliens may now acquire land for residence, commerce, industry, agriculture, burial, public charity or religion under the conditions and procedures prescribed in Ministerial Regulations and with the permission of the Minister. The Thai Cabinet recently approved (a) a draft amendment Bill to the Land Code that would allow foreigners to own not more than I Rai (1,600 sqm.) of land for residential purpose with the approval of the Ministry of Interior, and (b) a draft Bill on Condominium that would allow foreigners as much as 100% ownership of condominium in certain projects, subject to various conditions. Also the Industrial Estate Authority of Thailand Act allows aliens, at the Authority's discretion, to own land within an estate area so as to enable them to carry on their business activities. There are two categories of industrial estate: general industrial zone and export processing zones. Also under Petroleum Act of 1971 oil concessionaires are allowed to hold land. There is also discretion available to the Board of Investment (BOI) when granting a promotion certificate under the Investment Promotion Act to permit an alien to hold land for the purposes of

ensure that all investments do no harm and fully contribute to their economies in accordance with their economic development plan (see Table 2 summary of ASEAN countries' investment measures, p. 270), so they stipulate approval procedures and require foreign investors to report or notify their business activities to the government. Registration of a company is sometimes required as a pre-requisite for seeking promotion approval from the government. Conversely, in some cases a corporation will be registered only if it is granted promotion approval from the relevant authority. There are some conditions to fulfil prior to receiving the approval.

4.1.1 Indonesia

Indonesia has an approval and investment review process applicable to foreign investors. The criterion for approving FDI will be considered by the types and forms of business. The first will be based on a negative investment list[7] (the FDI must not engage in business prohibited by the negative list), the second will require foreign investors to form business firms in according to the laws which can be registered as a joint venture. Moreover, any company that wishes to do business categorised as important to the state and public services, such as port services, and generation and transmission as well as distribution of electric power for public use, telecommunications, atomic energy reactors and mass media, must do so through a joint venture where the share of the Indonesian partners shall be at least 5% of the entire paid up capital of the company at the time of establishment.

In Indonesia, a foreign-owned business must be incorporated under the Indonesian law[8] in the form of PT (perseroan terbatas)[9] and it is called a "foreign

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carrying on business.

[7] Law No. 1 of 1967 concerning Foreign Investment, and established by the President Decree No. 54 of 1993 which replaces the negative investment list year 1992. Also see APEC Committee on Trade and Investment (CTI) (1998) *Guide to the Investment Regime of the APEC Member Economies.* Singapore: APEC.

[8]. Art. 3 of The Foreign Investment Act. And also Art. 7 of the Compulsory Registration of Companies

company" (perusahaan penanaman modal asing) in order to distinguish it from domestic companies. The formal requirements for the establishment of a subsidiary of a foreign company is that it should be a joint venture[10] with one or more national corporations. A company in which the percentage of the foreign-owned equity is 51% or more, has to appoint a local agent as its distributor[11]. Moreover, a foreign-owned company cannot be registered under Indonesian law if it is involved in the business areas closed to foreign investors[12]. The Capital Investment Co-ordinating Board (BKPM) has the authority to approve/reject all foreign investments. It will examine the investment proposal, then issue a temporary letter of approval to all relevant administrative or regulatory bodies. If any such body considers that there is a problem with the proposed foreign investment then it would be rejected. If not, a temporary approval letter will be submitted to the President, who then issues a decree of approval. Soon after the Presidential decree is issued, the BKPM will issue eight permits[13] to the company which give it the opportunity to start its business. The

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Act No. 3, 1982 provided that agents and subsidiaries of foreign companies must comply with the same procedure for incorporation as local companies established under the Act.

[9]. The Ministerial Regulation and the Circular letter issued by the Ministry of Justice on 26th April 1967 "Establishment of a PT". Circular J.A. 5/31/24, 26th April 1967, and Art. 35 to 36 of the Commercial Code, which regulated the fee for establishing a PT by a foreign company. However, there is no regulation which mentions how much money must be paid in total to the Indonesian government on incorporation of such a company. The rule just provided that it has to form a PT. In practice, the most expensive component of the whole cost is charged by the notary, who charges a fee on the basis of a percentage of the authorised capital of the company to be incorporated.

[10]. For a foreign partner, the government's guideline states that a minimum foreign capital investment is US$ 250,000 as long as the joint venture company is in the labour intensive export oriented economic sector and operates a large enterprise.

[11]. There is a special restriction relating to foreign control of business in Indonesia. Foreign controlled export or import business cannot exist in Indonesia. Thus foreign companies are not allowed to trade into or out of Indonesia even trade within Indonesia is prohibited and they need to appoint a local agent for marketing. However, foreign companies established under the Foreign Capital Investment Act can import machinery, equipment or materials for their own use, but not for trade.

[12]. Art. 6 of the Foreign Investment Act stipulates areas of the economy which are closed to foreign investment if it involves full foreign control. These areas are those which are essential to the state and governing the life and the living condition of the public such as: port, harbours; production, transmission and distribution of electric power to the public; telecommunications; shipping; aviation; supplying of drinking water; public railways; development of atomic energy; mass media; and industries performing a vital function in national defence, such as the production of arms, ammunition, explosives, and war equipment.

[13]. The eight permits are as follows: the permanent letter of approval; a licence for processing raw materials; an identification number for conducting limited import and export; a licence for limited

regional BKPM or the regional government will issue four other permits which are a location or site permit; a land right (a right to build, or to use land); a building permit; and a permit to comply with regulations as required by the Public Nuisance Ordinance for all business. Foreign companies also have to comply with the Environment Act of 1982[14]. After that, general control[15] of foreign investment is exercised by the Deputy for Supervision of Implementation Controls of the BKPM[16].

Indonesia's foreign investment legislation and regulations could be changed, amended or replaced at any time by other legislation or regulations, and theoretically, they could be changed retroactively. In most ASEAN countries this has never occurred. However, recent changes have been made in Indonesia in respect of tax holiday facilities for foreign investment, which have affected foreign investors who were running their business before the new legislation came into force.

Indonesian law requires divestment of foreign ownership of companies. During the first stage, the newly established foreign company may have foreign equity

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domestic purchase; a product or services trading licence; a tax and duty exemption permit; a work permit for foreign expatriates; a right of exploitation if the foreign venture involves agricultural and fishing activities.

[14]. The 1982 Act conferred authority for protection of the environment on the Ministry of Population, Management and Environment, which co-ordinates with the Ministry of Health, the Ministry of Industry, and the Ministry of Internal Affairs. All of these bodies will examine and assess the environmental impact of a proposal and provide input to the co-ordinating Ministry. Normally proposals are accepted subject to negotiation between the government and the investors. Regarding pollution standards, Indonesia has not promulgated any general standards in relation to air, land or water pollution. Discharges are allowed based on the negotiation between government and the polluters. It is notable that there are no incentives under Indonesian Law for establishing non-polluting plants or encouraging non-polluting activities. Since Indonesia lacks clear regulations on environment protection and control of emissions relies on negotiation between government and the polluters, the system is inefficient and may lead to bribery and corruption. *Doing Business in* Asia: Indonesia, 1998.

[15]. Apart from the general function of control and supervision stipulated by the Presidential Decree No. 35, there are procedures for the control and management of the foreign investors through a policy of encouraging the gradual 'Indonesianisation' of foreign investment companies. However, it is generally agreed that this policy has not been successful. *Doing Business in Asia: Indonesia*, 1998.

[16]. The President decree of the Republic Indonesia No. 35 of 1985, Art. 15 provided that "It shall be the duty of the Deputy of Implementation Controls to assist the Chairman in the control and supervision of the implementation of investment which have been already approved by the government". Art. 16 of this Decree provided that the BKPM can control and supervise the implementation of investments which are already approved by the government; the use of facilities enjoy by the investors; resolve the problems appearing in the implementation of investment; study and evaluate reports and input on foreign investment submitted to BKPM and investigate those report; and prepare executive reports of BKPM's performance either regularly or occasionally for special purposes.

up to 85% or 95% for a business with an export orientation. But the local equity has to be increased to 20% in the first five years of commercial operation and to 51% in the following ten years. This fadeout or divestment requirement is still in force but it is temporarily waived by the Short Term Measures which ASEAN countries allow 100% of foreign equity in the company (See chapter 5). It is also notable that according to the government regulation, foreigners may buy shares on the share market, but not shares of companies that sell goods directly to consumers. And finally, a foreign capital investment licence shall not, generally, exceed 30 years[17].

At present, the Indonesia government will continue to review all regulations related to investment[18]. By creating prudent macro economic policy, and highly stable economic growth, political and social stability and the commitment of the Indonesian government to continue deregulation, the Indonesian investment climate will be more favourable, attractive and conducive to accommodate FDI flows from around the world. Indonesian comparative advantages in natural and human resources, market potential, as well as its strategic location, can combine comfortably with foreign capital and technology to provide goods and services for mutual benefit.

4.1.2 Malaysia

The Malaysian government has launched the Second Outline Perspective Plan (1991-2000) and the Seventh Malaysia Five-Year Economic Development Plan (1995-2010)[19]. These plans have one goal to make Malaysia a fully developed and industrialised nation by the year 2010. Toward this end, the manufacturing sector will assume the lead role in the nation's economic growth and in this respect, private

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[17]. Law No. 1 of 1967 on Foreign Capital Investment and Circular J.A.5/31/24; 26th April, 1967.

[18] ASEAN Secretariat (1998) *Compendium of Investment Policies and Measures in ASEAN Countries.* Jarkarta: ASEAN.

[19] Malaysia, Ministry of International Trade and Industry (MITI) (1999) *Information on Investment in Malaysia,* government announcement, as of December 1999.

sector investment will be strongly encouraged[20]. A number of industrial policies have been introduced to promote rapid growth in manufacturing sector. These were mainly aimed at attracting foreign investments especially from the multinational corporations of developed countries. A Capital Issues Committee and the Foreign Investment Committee were established in 1968 and 1974 respectively, to co-ordinate local and foreign investment and facilitate the equal treatment of FDI. However, foreign investors have to undergo the process of registering their firms in accordance with the Malaysian laws.

In Malaysia, a foreign-owned company has to register as "a foreign company" under the Companies Act 1965 with the Registrar of Companies (ROC), and thereby establish a branch in Malaysia[21]. The registration of a branch is at the discretion of the ROC.[22] A wholly-owned subsidiary may be approved[23] subject to a condition of future partial divestment of equity to Malaysian shareholders[24]. It is the policy of the Malaysian government to structure the ownership and control of companies and business in Malaysia to ensure a balanced participation by Malaysians, in particular by

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[20] APEC (1998) *Guide to the Investment Regime of the APEC Member Economies.* Singapore: APEC.

[21]. Before filing the application, the company must obtain the approval of the Industries Development Division of the Ministry of International Trade and Industry (MITI). Generally, MITI rapidly approves projects of foreign companies that follow on the branch's first approved project.

[22]. Previously, branches of foreign companies were rarely registered because the Registrar of Companies (ROC) required a letter of support from Ministry of International Trade and Industry (MITI) which was only given if the foreign company was awarded a contract with a government body. In 1993, the ROC began to allow the registration of branches without such letters of support, but it was announced at the end of 1995 that branches for the purpose of wholesale or retail trade would not be registered. Moreover, the immigration department still generally requires a letter of support from MITI for employment passes for expatriate employees of a branch. *Doing Business in Asia: Malaysia*, 1998.

[23]. For instance, to promote the hotel and tourism industry, 100% ownership is allowed for five years after which the company is required to restructure with at least 49% ownership held by Malaysians including 30% reserved for Bumiputras.

[24]. Malaysia has a very strong policy to ensure that indigenous Malay citizens (Bumiputras) are well protected, not just from the competition of foreigners but also even from their own citizens who are non-Malay. And this is the main objective of Malaysian government in approving and controlling foreign investment based mainly on the prescribed ratio of Malay citizen participation in Malaysian economy, either the ratio of Malay equity, shareholder, employment, control of business and administration. Foreign ownership is regulated not only by laws but also through extensive bureaucratic guidelines. Local and foreign equity ratios vary according to industry, technological level, export proportion and location of business. Ratios change according to the prevailing economic climate and government policy.

bumiputras[25] (ethnic Malay). This policy was enunciated in the New Economic Policy (NEP) and the National Development Policy (NDP). The proportion of equity permitted to be held by foreigners may vary depending on several factors. Among the most important are whether the industry is of a type encouraged under Malaysian economic policy, and the proportion of products to be exported. Under the Industrial Co-ordination Act 1975 (ICA), all manufacturing companies with shareholders' funds of RM 2.5 million and above or engaging 75 or more full-time employees need to apply for a manufacturing license. And all foreign investment proposals, irrespective of value of investment and sector, would therefore need to be licensed[26]. Any issue of a licence must be consistent with the national economic and social objectives, promoting the orderly development of manufacturing activities of Malaysia.

Particular business sectors will also be regulated by relevant Acts of Parliament or subsidiary legislation. For example, the telecommunications and power generation industries are regulated by the Telecommunications Act and Electricity Supply Act respectively, together with their subsidiary regulations. Foreign companies can establish a business presence in Malaysia either by acquiring control of a Malaysian company under the Companies Act 1965, or by incorporating such a company and carrying on business through such a company.

A separate regime applies to foreign companies who wish to use the Federal

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[25]. A company has to have a Bumiputra equity participation generally at 51% or more, unless the foreign company has been granted MITI's approval. Moreover, all firms in Malaysia have to employ and train Malaysian personnel so that employment at all levels reflects the ethnic composition of the country.

[26]. Applications for manufacturing licenses are submitted in prescribed form to the Malaysian Industrial development Authority (MIDA) for screening and evaluation. The agencies and ministries involved are MIDA and MITI and under the ICA, notification to screening authorities is mandatory. If the company undertakes manufacturing activities then it requires a manufacturing licence from MITI. Licences issued by MITI are inevitably accompanied by conditions. These conditions will usually specify the foreign ownership restrictions and may require that the approval of MITI be obtained before any transfer of share held by foreign parties may be affected. If the company is not a manufacturing one, then it will have to comply with the guidelines laid down by the Foreign Investment Committee (FIC). And in certain case of a joint venture, it may require the approval of both MITI and FIC.

Territory of Labuan[27] as an offshore base: by incorporating an offshore company in the Federal Territory of Labuan under the Offshore Companies Act 1990 and carrying on business through such company; or by registering itself under the Offshore Companies Act 1990 as a foreign offshore company. In most cases, foreign investors may form a subsidiary company under such companies. If it is envisaged that the only activities carried out will be those of a regional operational headquarters, the establishment of an overseas headquarters company could also be considered.

Under Malaysian law, a foreign company is required to lodge with the Registrar the balance sheet and other documents, in such form and containing such particulars and accompanied by copies of such documents as the company is required to lodge in its place of incorporation or origin. Where the foreign company is not required by the laws of its country of origin to hold an annual general meeting or prepare a balance sheet, the company is required to file a balance sheet in the form required by a public company incorporated under the Companies Act 1965.

Every foreign company also has to lodge with the Registrar a prescribed document appointing one or more persons resident in Malaysia, not including a foreign company, authorised to accept on its behalf service of process and any notices required to be served on the company. It may also be possible to appoint agents in Malaysia to carry out the activities intended. As the Malaysian government has a policy to ensure the participation of indigenous people, there are also criteria to control a Bumiputra company and requiring the disclosure of non-resident shareholdings of the foreign company[28].

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[27]. Labuan is an island located off the state of Sabah in Northern Borneo, a federal territory of Malaysia. It became a special international offshore financial centre in 1990. The relevant legislation contains provisions for offshore companies, banking, insurance and trust companies, and special tax rules for qualifying companies engaged in qualifying offshore activities.

[28]. The Company Act 1965 compels disclosure of substantial shareholding by all natural person and bodies corporate. The annual return of the company must include a list containing the names and

Generally, foreign companies would be under the control and supervision of the FIC to ensure that foreign investors comply with the National Development Policy (NDP) and the New Economic Policy (NEP)[29], and that foreign companies contribute to the improvement and enhancement of the Malaysian economy as well as to further stimulate trade and investment for Malaysia. FIC also administers the "Guidelines for the Regulation of Acquisition of Assets, Mergers and Takeovers, 1974". These seek to ensure that proposed acquisitions of assets, interests or mergers result directly or indirectly in a more balanced Malaysian participation in ownership and control.

Despite the regulatory control on FDI (screening and approval process due to the economic development and planing policies), the Malaysian government continues to promote foreign investment, and aims to be flexible and more pragmatic in the implementation of its policies and programmes so as to create a favourable climate for private investment. They introduced the "one-stop" facility for interested investors that provide information on investment opportunities and procedures and assists in the review/notification and operational aspects of investing. The Malaysian Industrial Development Authority (MIDA) was designated as the Co-ordinating Centre on Investment. Investors only need to approach MIDA to obtain most of the approvals required at the Federal level in respect of manufacturing and granting of tax incentives. MIDA's present role is more encompassing, thus reducing the number of agencies and departments that investors have to approach and the time taken to get the relevant approvals[30]. MIDA claimed that the greatest advantages to investing in Malaysia are the political stable climate, the solid infrastructure network, the high-

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addresses of all members of the company showing the number of shares held by each member, ratio of non-Malay citizen shareholders.

[29]. NEC's declared two-pronged objective is to (i) reduce and eradicate poverty by raising income levels and increasing employment opportunities and (ii) accelerate the process of restructuring Malaysian society so as to correct the economic imbalance and to eliminate the identification of race with economic functions.

skilled labour force and the availability of raw materials.

4.1.3 The Philippines

The emergence of a new leader (a transition of power from the government of Marcos to Aquino and now to Fidel Ramos) through free and democratic elections after more than two decades has inspired confidence not only among local but also foreign investors. The overall strategy of the government is to achieve a sustained and increasing rate of growth for the economy and that seeks an investment-led growth rate as well as export-led growth mode. The country is geared up for adjustments in investment-related policies all in the direction of liberalisation and simplification. Several specific steps are currently being undertaken in this regard. This includes the Foreign Investment Act (FIA) or R.A. 7042 which will further open new opportunities for foreign investors. Moreover, new legislation that would complement the Foreign Investment Law is being worked out. These are

> first, a bill that seeks to increase the length of leases to foreign investors;
>
> second, a bill that applies the condominium concept on industrial estates, again to be able to improve the security of tenure of foreign investors over the lands that their facilities occupy;
>
> third, a bill that gives national status on the equity investment of multinational financial institutions like the Asian Development Bank and the International Finance Corporation;
>
> finally, a bill that would allow companies to obtain additional relief and incentives such as accelerated depreciation and net operating loss carryover. (APEC 1998: Rp-3).

However, foreign investors still need to comply with national laws regarding registration and operation. In the Philippines, foreign firms may do business through a branch, a subsidiary, a representative office, or a joint venture. Except for professional firms, which are not normally allowed to incorporate, most business ventures adopt the corporate form of organisation, which are registered with the Securities and

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[30] Malaysian Industrial Development Authority, Trade Commission (Investment) (1999) *Investment Policies*. Malaysia: MIDA.

Exchange Commission (SEC). The SEC is the primary governmental agency exercising regulatory powers over foreign companies, which are subject to the provisions of various laws and regulations on investment[31]. The difficulty normally encountered by foreign investors is the filing of applications which includes full compliance with the criteria set up by the BOI[32], interpretation of the coverage of activities listed in the Investment Priority Plan, submission of the required applications, supporting documents and project studies, and possible opposition from sectors or enterprises that might be adversely affected by the proposed project. The BOI requires publication of the application and conducts a hearing if objections to the application are received. If approval is obtained, a list of general and specific terms and conditions[33] is normally attached to the certificate of authority issued by the Board upon approval of the application for investment. Foreign companies must apply to the SEC for a licence to do business in the Philippines[34]. After a licence has been granted by the SEC, the foreign company may commence to transact business in the country, subject to some additional requirements[35]. The SEC will also require the

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[31]. They are the Corporation Code, the Omnibus Investment Code (exec. Order No. 226, 1987), the Foreign Investment Act (Rep. Act No. 7042, 1991 as amended by Rep. Act No. 8179, 1996) and other special laws.

[32]. All BOI programs and policies are oriented towards raising the standard of living of the Filipino people through a more equitable distribution of the benefits of progress. In pursuit of this goal, the BOI encourages Filipino and foreign investments in projects that will accelerate the development of preferred industries; promote the exports of manufactured goods; and encourages foreign capital to establish pioneer projects which are capital-intensive and which utilise substantial amount of domestic raw materials.

[33]. The general terms and conditions include certain management, financial, operations and marketing commitments which must be properly compiled with so as to avoid grounds for cancellation of registration; nationality, and reporting requirements vary depending upon the nature of the business enterprise.

[34]. However, after the amendment of the Foreign Investment Act of 1991, companies registered under the Foreign Investment Act are no longer required to secure approval from the Board of Investments (BOI). Their investments are also automatically registered with the Central Bank after the registration with Securities and Exchange Commission (SEC) or Bureau of Trade regulation and Consumer Protection (BTRCP) Also SEC and BTRCP are mandated to act on applications for registration within 15 working days from the official receipt of the application; otherwise, the applications will be considered automatically approved.

[35]. This includes the requirement to deposit security with the SEC, re-issuance or amendment of a licence when a foreign company changes its name, objectives, or it becomes a party to any merger or consolidation.

company to deposit additional securities if the actual market value of the securities on deposit has decreased by 10% or more of their actual market value at the time they were deposited[36].

In the Philippines, there are nationalisation laws[37] that affect the percentage of foreign ownership in a company. Also the provisions of the Constitution and other nationality laws impose minimum Filipino ownership requirements in certain areas of investment, especially under the Foreign Investments Act, which provides a negative list of areas closed to foreign investors or which require a minimum Filipino equity. Foreign-owned companies are also subject to certain reporting requirements[38].

Central Bank approval and registration of the foreign investment[39] is required to enable the foreign investor to repatriate investments returns out of the country, if the funds utilised for repatriation are to be sourced from the Philippine banking system. However, the foreign investors' right of repatriation and remittance is subject to foreign exchange restrictions which the Central Bank may impose.

There are requirements that the majority of the directors must be residents of

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[36]. A foreign company has to deposit with the SEC for the benefit of present and future creditors of the company in the Philippines, securities with an actual market value of at least 100,000 pesos within 60 days after the issuance of the licence. And the company has to deposit additional securities equivalent in actual market value to 2% of the amount by which the company's gross income for the fiscal year exceeds 5,000,000 pesos within 6 months after each fiscal year.

[37]. Certain areas of business are reserved for Philippine nationals. Nationalisation laws and the minimum Filipino ownership requirements for different areas of investment on the Philippines are as follows: retail trade ("the Retail Trade Nationalisation Act" prohibits aliens or foreign companies from engaging, directly or indirectly, in retail trade except those which produce goods for sale by commercial and industrial consumers, or that sell goods to customers who will use the goods to render services to the general public); banking and finance (rural banks must be 100% Filipino-owned. Commercial and private development banks generally require 70% Filipino ownership of the voting capital stock, and finance companies require at least 60% Filipino equity); mass media (mass media corporations or associations must be 100% Filipino-owned); public utilities; public works and government contracts; public and private land (transfer of assignment of agricultural land, deposition, exploitation, development and utilisation of agricultural, timber and mineral land; fishing and other aquatic rights); co-operative associations; geothermal energy; and coconut industry.

[38]. For controlling foreign investment, a foreign company has to report to the BOI and SEC as well as to the Bank Sentral (the Central Bank).

[39]. Foreign investment in enterprises registered under Books I (BOI) and VI (EPZA) of the Omnibus Investment Code (E.O 226) are required to be registered with the Central Bank. Foreign investments in enterprises registered under the 1991 Foreign Investments Act (RA 7042) shall be deemed registered with CB after SEC registration.

the Philippines and the secretary must be a Filipino citizen. For banks and banking institutions and domestic air carriers, at least two-thirds of the members of the board of directors must be Filipino. For public utility firms all executive and managing officers must be Filipino.

However, recently the Philippines government declared its aim to facilitate foreign investment, and to broadly reduce the differentiation between foreign and local investors, to be in line with policies on liberalisation and deregulation[40]. With the passage of the Foreign Investment Act in 1991 all activities that are not covered by the negative list are open to foreign investors who may wish to engage in such enterprises on a majority basis. Such activities may be entered into by foreigners following exactly the same procedures as a Filipino national would have to go through. There is also a move to further reduce the coverage of the negative list through the elimination of the specific laws that restricted foreign equity participation in the covered activities. Moreover, the Council for Investment (CFI) help promote and facilitate the FDI by acting as a "One-Stop" action centre for foreign and local investors with authority to act on any problem concerning the setting up of business or the making of investment[41].

4.1.4 Singapore

The Singapore government actively provides businesses in Singapore the opportunities to operate within a free market economy. Most industries are open to foreign investors, and multinational corporations are viewed as valuable contributors to economic growth. They are constantly encouraged to use Singapore as an international business centre for their subsidiaries, associated companies or branches in other countries. Therefore, no restriction is generally imposed on the percentage of

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[40] BOI Philippines (1998) *The New Investment Policy of the Philippines.* Manila: BOI.
[41] APEC (1998: RP-35).

foreign ownership of business operating in Singapore. The investment promotion effort has been on higher value-added and skilled-intensive activities including services sector activities such as financial services, information technology services and offshore services. Moreover, there has been no trend in divestment required by the Singapore government. Therefore, foreign investors can confidently invest in this country and can fully own and operate their business without constraint. (APEC: 1998, SIN_2).

There is no screening of foreign investment in Singapore. Every business in the country must be registered under both the Business Registration Act and the Company Act, which are administered by the Ministry of Finance. A foreign corporation must register with the Registry of Companies and Business (ROC) before commencing operations in Singapore[42]. Foreign companies are subject to filing and reporting requirements, in particular they must periodically report their financial status to the Registrar of Companies[43]. Thus a foreign company can carry on business in Singapore either by registration as "a foreign company"[44] or by incorporating a subsidiary[45]. A branch office must also register in accordance with Part XI of the

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[42]. It should be noted that ROC has the power to refuse to register a foreign company with a name that is "undesirable".

[43]. There are two specific requirements for foreign company to report to the ROC: firstly, a foreign company must lodge with ROC a report of its annual general meeting, a copy of its balance sheet made up to the end of its last financial year and it should be in the form required by the company's country of incorporation. If the balance sheet does not sufficiently disclose the company's financial position, ROC has the power to require further information to be provided to supplement the balance sheet delivered; secondly, a foreign company is required to prepare and lodge with the ROC an audited statement showing its assets used in and liabilities arising out of its operations in Singapore as at the date to which its balance sheet was made up.

[44]. Section 4 of the Companies Act defines "a foreign company" to include incorporated or unincorporated bodies formed outside Singapore which in their country of origin may sue or be sued or hold property. Once such an organisation establishes a place of business, or carries on business in Singapore it should register under Div. 2, Pt XI of the Companies Act. Registration under the Companies Act specifically exempts the foreign company from the requirement of registering also under the Business Registration Act, Sec 4 (j). The registration provisions of the Companies Act require the foreign company to appoint at least two agents resident in Singapore for the purpose of accepting service of process and to establish a registered office in Singapore.

[45]. If a foreign company wishes to establish a separate legal entity in Singapore, it can incorporate a company in any forms such as a company limited by share, a company limited by guarantee, or an unlimited company.

Companies Act. If the foreign company intends to do business as a sole proprietor or as a partner, then the procedures referred to under "Sole proprietorship/partnership" have to be complied with, after the company has been registered as a foreign company under the Company Act. However, applications for the establishment of representative offices must be made in writing in prescribed forms to the Trade Development Board (TDB), which is a statutory board.

The Registrar has primary authority over the registration of a foreign company [46]. The Department of Trade, the Economic Development Board (EDB) and the Trade Development Board (TDB) may also have jurisdiction in relation to the area of business in which the company wishes to operate. However, Singapore does recognise the possibility that representative offices may carry on strictly promotional and liaison activity in Singapore without the need to register, so long as such activity does not amount to "carrying on business". Generally, the Singapore government actively encourages foreign investment and treats foreign investors the same as local ones. With the exception of national security and certain industries[47], there is no restriction on foreign ownership of Singapore corporations, and there is no screening of foreign investment in Singapore as mentioned.

4.1.5 Thailand

Thailand recognises the contribution of foreign investment to the country's overall economy. Thailand has always sustained favourable attitudes towards FDI, and the National Economic and Social Development Plan sets principal development

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[46]. The ROC has primary jurisdiction over the activities of foreign companies. It is important to note that under sec 369(1) the Registrar may refuse to register a company as a foreign company if it is being used or is likely to be used for an unlawful purposes prejudicial to the public peace, welfare or good order in Singapore or is acting or likely to act against the national security or interest. This goes beyond the role of most Registrars of Companies in other countries.

[47]. A 40% limit is placed on foreign ownership of locally incorporated banks, airlines and shipping companies are specifically restricted as to the amount of foreign ownership, the manufacture of arms and ammunitions is subject to government control, public utilities services electricity, gas and water are publicly owned, legislative control is exercised over the newspaper publishing industry.

guidelines that the government must continue with liberalisation policies to facilitate private business operations both domestic and foreign investment (APEC: 1998, THA-1). The government will play only supporting, promotional and supervisory roles to investment in this country. The investment promotion policies clearly spell out the government's intention to promote the role of FDI in Thailand, particularly in areas where expertise is lacking[48]. However, in order to gear development towards value-added industries and to promote remote areas, the government set some requirements to investors by granting incentives to investors, both domestic and foreign alike, in engaging the promoted industries.

Thailand has undergone a series of phases of evolution of the foreign investment regime. In the 1960s-1970s, the Thai government encouraged import-substitution industries so a significant volume of foreign investment was attracted to these industries. During the 1980s, a strong emphasis was placed on promoting exports to strengthen the country's foreign exchange position. Therefore, efforts were geared towards encouraging foreign companies to use Thailand as a production base for exports. Most export-oriented activities were labour-intensive. The 1990s have seen a shift to industrial deepening and broadening. The export boom in the 1980s was accompanied by a surge in the imports of capital goods, intermediate goods and raw materials. The government thus attempted to encourage more localisation, particularly in export industries. Foreign investments in supporting industries, value-added industries, and high technology industries have been actively encouraged. Efforts relying on market mechanism have been geared towards the creation of industrial linkages. An important theme of Thai investment policies in 1990s is industrial decentralisation, investment incentives have been granted to both local and foreign

[48] BOI Thailand (1998) *The Foreign Investment Regime: The role of BOI.* Bangkok: BOI.

investors that accord their business in remote areas. Thai investment policy toward foreign investors is positive and encouraging, apart from the specific restricted business, foreign investors would be treated exactly the same as the domestic investors.

In Thailand, there are two major laws affecting foreign investment: the Investment Promotion Act of 1977[49], and the Alien Business Act of 1972[50]. The BOI sets various minimum Thai ownership requirements and conditions for BOI grants. If the project produces for the Thai market, then generally at least 51% of the shares must be owned by Thai nationals. This does not apply to Zone III projects[51] as they may produce for the Thai market regardless of the foreign shareholding. On the other hand, if the project exports at least 50% of its products, foreigners may hold a majority of the shares; if 80% or more of total sales is to be exported, a completely foreign-owned project will be considered for promotion. For projects in the agricultural, animal husbandry, fishing, mining, mineral exploration or services industries, Thai nationals must hold at least 51% of the shares. However, in a project with more than Baht 1 million investment capital, foreigners may initially hold a majority of, or wholly own, the venture, provided that Thai nationals hold at least 51%

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[49]. The Investment Promotion Act of 1977 provides the legal framework for investment incentives granted by the Office of the Board of Investment (BOI). The BOI is given wide discretionary powers to encourage investment in the areas considered to be the most beneficial for Thailand's economic and social development. BOI incentives include tax privileges, relaxation of restrictions on foreign participation, business protection and a host of others.

[50]. The most important law governing foreign participation in business in Thailand is the National Executive Council Announcement No. 281 B.E. 2515 (1972), which is generally referred to as the "Alien Business Law". This law limits the maximum alien ownership in certain business to less than 50% and requires certain licences before a 50% or more alien owned entity may engage in other activities.

[51]. In order to encourage industrial development in regional areas, BOI will grant promotion status to investments in remote areas that are classified as zone III. All approved projects located in zone III are entitled to various exemptions, such as import duty exemption on machinery, raw materials, and other essential inputs, corporate income tax exemption, and double deduction from taxable income of water, electricity, and transport costs. Approved projects in zone III are also exempt from the minimum Thai national ownership requirement.

of registered capital within five years from the date of operation[52].

Foreign investors may choose any of several forms of business organisation: sole proprietorship, partnerships, limited companies, joint ventures, and representative or regional offices[53]. A foreign company can also register a branch in Thailand or incorporate a subsidiary in the country. Certain formalities need to be complied with according to the type of business to be conducted. Also certain licences and certificates of registration are required for specific activities. The licences or permits, which may well apply to a particular business are: factory licences[54], commercial registration[55], taxation registration[56], foreign business[57], and alien work permits[58]. But

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[52]. The BOI was empowered to waive foreign ownership requirements during the years 1992-1996 for the following projects; transportation system infrastructure projects, public utility projects relating to the maintenance and restoration of environment, and projects related directly to the development of technology.

[53]. Representative offices are intended to allow foreign companies to establish a liaison office to support and oversee activities of its head office. There are three types of representative offices provided for in the legislation: an international business office; a foreign bank office; and a finance, security or Credit Foncier office. Regional offices are intended to oversee activities of branches or subsidiaries throughout Southeast Asia on behalf of the head office. None of these types of offices may produce income. Regional offices are not allowed to earn income and they are exempt from Thai taxes and most annual filing requirements. But it is necessary to get approval from the Department of Commercial Registration to establish these types of offices.

[54]. Factory licences are regulated by the Factory Act of 1992. Under the 1992 Act, it requires a licence to establish a factory in certain types of factories while the others are subject to the notification issued under the Act.

[55]. The Department of Commercial Registration of the Ministry of Commerce is responsible for monitoring the Alien Business Law. The Office of the Board of Investment is in charge of monitoring the compliance of promoted companies with conditions stipulated in investment promotion certificates. Promoted firms have to report regularly to the Office of the Board of Investment.

[56]. Taxation registration is required for all businesses that are required to collect VAT. Those enterprises must obtain a VAT registration certificate prior to commencement of a business whose projected gross annual revenue will exceed 600,000 Baht or within 30 days of the business exceeding this income. (Companies incorporated under Thai law are also required to pay corporate income tax on their profits. They may also be required to pay specific business tax depending on the type of business activity in which they engaged). Registered traders must file a monthly tax return and submit monthly remittances to the Revenue Department on or before the fifteenth day of the following month. The amount of VAT due must be remitted at the time of submitting the monthly VAT return, and registered traders are entitled to a tax credit for VAT paid to another VAT trader.

[57]. Only those foreign legal entities engaged in business specified in the Alien Business Law are required to acquire an Alien Business Licence from the Ministry of Commerce. The Alien Business Law is applicable to foreigners or juristic persons that: (1) have majority foreign shareholding; (2) have at least one-half of the number of shareholders, partners or members of which are aliens; (3) have limited partnership or registered ordinary partnership having an alien as manager or managing partner. The Alien Business Law sets three categories of business activities where foreign legal entities and foreigners are (1) prohibited in category A., (2) permitted only with the Board of Investment promotion in category B. (3) implemented only with the permission of the Ministry of Commerce or Board of Investment promotion in category C. (Details of these categories are stated in the section of restricted sectors discussed below) The Alien Business Law does not apply to aliens engaged in business with the

there are no technology licensing requirements tied to the process of applying for an Alien Business Licence or investment promotion.

In addition to the Alien Business Law, there are several statutes, which impose conditions of majority ownership and management by Thai nationals in specific business sectors: commercial banking[59]; finance and security business[60]; life insurance [61]; vessel operating[62]; and recruitment agency[63]. For certain other sectors, such as hotel operation and pharmaceutical dispensing, it is required that the individual holder

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permission of the Royal Thai Government, or covered by an agreement between the Royal Thai Government and a foreign government which exclude certain activities, for instance under the agreement between Thailand and the US Thus American nationals, entitled to the protection under the Treaty of Amity and Economic Relations between the two, are not generally subject to the provisions of the Alien Business Law. There are , however, some business activities which the US-Thai Treaty does not cover, namely communications, transportation, fiduciary function, banking involving depository functions, the exploitation of natural resources and land, and domestic trade in indigenous agricultural products.

[58]. Permission to work in Thailand is granted by the Alien Occupation Division of the Ministry of Labour and Social Welfare with the issuance of a work permits. On 30th June 1997, the Thai government established a 'one-stop' service centre to facilitate the issuance of relevant work permits and immigration authorisations. The centre's service can be extended to investors who meet certain investment criteria.

[59]. The Commercial Banking Act B.E. 2505 (1962) requires that Thai nationals must hold not less than three quarters of the total issued shares in a commercial bank and that at least three quarters of the total number of directors must be Thai nationals.

[60]. The Act on the Undertaking of Finance Business and Security Business and Credit Foncier Business B.E. 2522 (1979) and the Security and Exchange Act B.E. 2523 (1992) stipulate that the Thai ownership and management requirements for finance and Credit Foncier companies are the same as for commercial banks. But there are no such restrictions on foreign participation in securities business under this Act, although they are subject to the Alien Business Law.

[61]. Life Insurance Act B.E. 2535 (1992) and the Casualty Insurance Act B.E. 2535 (1992) require that Thai nationals must hold not less than three quarters of the total number of shares sold and that at least three quarters of the total number of directors must be Thai nationals.

[62]. Thai Vessel Act B.E. 2516 (1971) requires that: (i) at least 70% of the capital in a limited company, public limited company or partnership owning a Thai vessel be owned by a natural Thai person or by a wholly owned juristic entity, with all shareholders, directors, or partners of such entity must be Thai persons, organised under Thai law where the subject Thai vessel will trade in Thai territorial waters, and ; (ii) where the Thai vessel will specifically be used in international marine transport, at least 51% of the capacity in the company owning the Thai vessel must be owned by a natural Thai person or at least 51% by a wholly Thai owned company organised under Thai law with all of its shareholders and directors being natural Thai persons. The majority of the directors of such vessel owning company, and all of the unlimited liability partners in the case of a limited partnership, must also be Thai nationals. A Thai national person who, for and on behalf of an alien, holds title to a Thai vessel or capital of a juristic person owning a Thai vessel, will be subject to a fine not exceeding Baht 500,000 and imprisonment not exceeding five years. The juristic entity owning the vessel must be organised under Thai law and have its principal office in Thailand. It can be seen that the Vessel Act of 1971 has the most intricate method of imposing 'real' Thai ownership in a juristic owning a Thai vessel operating in Thai territorial waters. *Doing Business in Asia: Thailand*, 1998.

[63]. Employment Provision and Employment Seekers Provision Act B.E. 2528 (1985) provided that recruitment agency work is reserved for Thai nationals under the Alien Business Law. In addition, both the manager of the establishment and any corporation formed as a recruitment agency must be of Thai

of the licence be an individual Thai national.

However, Thailand welcomes foreign investment and sustains favourable attitudes towards FDI, and the government continues with liberalisation policies to facilitate private business operation. Nevertheless, the government's intention is to promote business areas where expertise is lacking, industries in remote areas, and industries that are important and beneficial to the country's economic and social development and to national security[64].

4.1.6 Overview

Approval procedures for FDI in ASEAN countries were fairly stringent until the late 1980s. Eligibility criteria were used in many countries to direct FDI inflows towards specific industries, such as sophisticated technological industries, heavy industries and chemical industries. They also restricted foreign competition in areas reserved for domestic investors. Government authorities strongly preferred minority ownership by foreign investors except in particular cases, for instance technology-intensive projects and export-oriented industry.

In conclusion, ASEAN countries targeted FDI inflows in specific industries and encouraged specific forms of TNC engagement. At the end of the 1980s, a major wave of liberalisation began because ASEAN countries needed inflows of FDI to enhance their industrialisation in sophisticated technology industries, reflecting the emergence of a significantly less restrictive attitudes towards FDI in the region. Most importantly for foreign investors, the principle of equal treatment of foreign and domestic investors began to be widely accepted in the region, mainly through changes

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nationality.

[64]. Under the Investment Promotion Act, BOI may approve the promotion of investment projects in agriculture, animal husbandry, fishery, mineral exploration and mining, manufacturing and services when it considers that the products, commodities or services are either unavailable or insufficiently available in Thailand or are produced by an outdated process; are important and beneficial to the country's economic and social development, and to national security; and are economically and

in policy rather than the laws. Legal changes have been after 1998 under the Short-Term Measures and AIA (discussion in chapter 5 below). Industries previously considered "sensitive" have been gradually opened to FDI, and restrictions on profit remittances have been relaxed. Ownership restrictions have also become more liberalised; in particular, foreign majority ownership, extending up to 100% in certain industries, is now possible in most ASEAN countries, although a number of activities, especially in strategic industries, remain reserved for domestic enterprises (see chapter 5, section 5.1.3.3 for more details). Furthermore, approval procedures have become less burdensome, with automatic approval now being used more widely. One-stop service agencies have reduced bureaucratic hurdles. As a result, FDI policies in ASEAN countries are beginning to converge around broadly similar international standards. Nevertheless, the perception of the private sector is that the FDI regimes of several ASEAN host countries need further improvement; it appears to be difficult for foreign investors to acquire a controlling share in ASEAN companies. Malaysia and Thailand are considered to be the most restrictive in this respect. Foreign investors are constrained in employing foreigners. Also investment in some ASEAN countries, e.g., Malaysia and Indonesia, continues to be directed by government to a considerable degree. Notably, regulatory obstacles were the most important factors in discouraging some investments[65]. However, to the extent that regulatory deterrents to FDI exist, they are faced by all foreign investors. They do not discriminate against any particular country.

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technologically appropriate, and have adequate preventive measures against damage to the environment.

[65]. These views are expressed in the results of the survey of a number of firms of the European Round Table (ERT), an association of large European TNCs, carried out for a 1995 study: out of 25 factors discouraging investment, which were either explicitly considered in the survey questionnaire or identified by individual respondents.

4.2 Ownership Limits and Restricted Sectors

Ownership limits and sectoral restrictions are the main control on FDI in ASEAN countries. The main purpose of these restrictions is to protect the interests of nationals from competition from foreign investors in those business areas which have been regarded as key sectors for their national economies or to protect "sensitive sectors", and also business concerning national security and the public interest. In general, these controls are intended to encourage their nationals to participate in their economy and ensure a balance of controlling power in their economic activities.

4.2.1 Indonesia

In the case of Indonesia, limitation of ownership is subject to a negative list[66]. The Investment Negative List is valid for three years and subject to annual review. Now foreign investment is subjected to the new government regulation No. 20 of 1994 concerning share ownership in foreign capital investment enterprises, which allows 100% foreign equity ownership in all areas except those in negative list. This clearly shows the more liberalised investment policy of Indonesia[67]. The Indonesian government clearly declared that

> "To maintain and speed up the momentum of national development, the deregulation of policies and measures and simplification of investment procedures should be continued and implemented in order to enhance and improve the productivity and efficiency of economic sectors. Besides that, due to the need of Indonesian economic development, the presence of foreign direct investment should be encouraged to support economic development." (APEC, 1998: INA-1).

Therefore, foreign investors are encouraged to fully invest in this country except those in the negative list, which is transparent and limited only to the security and public interest. Accordingly, the Indonesian government expressed that it should take any

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[66]. The Negative Investment List is enacted by the Law No. 1 of 1967 concerning Foreign Investment, and established by the Presidential Decree No. 54 of 1993 which replaces the Negative Investment list of 1992. It is now replaced by the Government Regulation NO. 2/ 1994.

[67] See ASEAN Secretariat (1998) *Compendium of Investment Policies and Measures in ASEAN Countries.* Jakarta: ASEAN Secretariat.

measures to create an attractive and conducive investment climate and should implement many new measures with transparency and consistency. (APEC: 1998: INA-1).

> The negative lists have been classified into five categories as follows:
>
> (1) sectors that are closed to foreign investment[68];
> (2) sectors that are closed to foreign investment, except for new projects that export at least 65% of the products[69];
> (3) sectors that are closed to new investment, except for projects exporting 100% of their production[70];
> (4) sectors that are totally closed to foreign investment[71] are contracting services in forest logging, casino/gambling, utilisation and cultivation of sponges, marijuana and the like, veneer, penta chlorophenaol, dichloro trichloro ethane (DDT), dieldrin, and chlordane;
> (5) sectors that are reserved for small-scale industry in co-operation with medium and large scale industry[72] are mainly in agricultural production such as dairy cow breeding, shrimp larva culture, coral fish catching, salted and dried fish, various flours from grain, brown sugar, soybean products, yarn-spinning, fabric printing, weaving, knitting, lime and lime products, and household clay ceramic goods.

Moreover, the Indonesian government has taken various specific actions to stimulate a large increase of foreign investment in the last five year, namely the continuity of deregulation and debureaucratisation efforts[73]. The new wave of investment liberalisation of Indonesia clearly facilitates the process of open regionalism,

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[68] Manufacturing of aircraft, motor vehicles (except for manufacturing at least equal to the present degree of localisation implemented by existing motor vehicle manufacturers), utility boilers, explosive materials and the like, printing of valuable paper (postage stamps, duty stamps, bank notes, passport) postcards, powder milk, palm oil, sawmills, plywood, mangrove wood products, block board, and ethyl alcohol (Negative list No.2/1994).

[69] Manufacturing of cigarettes and medicine, including pharmaceutical formulation and traditional herbal drugs (Negative list No.2/1994).

[70] Manufacturing of artificial sweeteners, alcoholic beverages, fireworks, and disposable gas lighters. Service sectors that are closed to foreign investment are taxi/bus, local shipping, scheduled chartered flights, aircraft and components workshops located in the airport, retail trade, trade supporting services/advertising, private television broadcasting and radio broadcasting services, and any industry which involves the use of photographic equipment (Negative list No. 2/1994).

[71] contracting services in forest logging, casino/gambling, utilisation and cultivation of sponges, marijuana and the like, veneer, penta chlorophenaol, dichloro trichloro ethane (DDT), dieldrin, and chlordane (Negative list No. 2/1994).

[72] dairy cow breeding, shrimp larva culture, coral fish catching, salted and dried fish, various flours from grain, brown sugar, soybean products, yarn-spinning, fabric printing, weaving, knitting, lime and lime products, and household clay ceramic goods (Negative list No. 2/1994).

[73] For example, liberalisation of the financial sector, relaxation of import and export procedures (the October Package of 1998), harmonisation of import tariff codes, reduction of import tariffs, and reduction of the number of business fields that were closed for investment (the June Package of 1991), the simplification of drawback system procedures, and intensification of investment promotion activities especially for facilitating the industrial relocation from NIEs and Japan (BKPM, Indonesia (1998) *The New Investment Policies* Jakarta: BKPM).

especially it conforms to the AIA in opening up industries to both ASEAN and non-ASEAN investors (discussed in chapter 5).

4.2.2 Malaysia

There are generally no restrictions on foreign participation in the manufacturing sector. However, there are guidelines on foreign equity participation in the manufacturing sector, which are governed by the level of exports proposed by the applicant companies. In Malaysia (which limits ownership depending on the proportion of production exported), foreign equity in any manufacturing company is required to be licensed[74] under the Industrial Co-ordination Act 1975 (ICA) by the Ministry of International Trade and Industry (MITI)[75]. There may be equity conditions annexed to a licence. It is difficult for a branch of a foreign company to obtain a manufacturing licence, and therefore a foreign company wishing to establish a manufacturing operation must generally incorporate a subsidiary.

However, MITI allows up to 100% foreign equity for a manufacturing company that exports 80% or more of its products. Foreign investors may also hold up to 100% of equity if the products do not compete with those manufactured locally for the domestic market and at least 50% of the products are exported, and if it invests RM 50 million or more in fixed assets, or implements projects which have at least 50% value added. Also 100% foreign equity may be allowed for companies producing high technology or priority products for the domestic market. Proportions of 30%, 51% and 79% of foreign equity may be permitted, depending on the level of technology involved and the ratio of exports. The reason for these restrictions is to

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[74]. Companies with shareholders' funds of less than RM 2.5 million or less than 75 employees are exempt from the licensing requirements of ICA.

[75]. The National Development Policy of the Malaysian government has the objective of ownership in the Malaysian economy, including share capital in any Malaysian company, being at least 30% by Bumiputras (the indigenous people of Malaysia), 40% by other Malaysians and 30% by foreigners. Foreign ownership of the Malaysian economy is controlled by legal and non-legal or administrative

allow ethnic Malaysians to participate proportionately in business. These policies clearly show that Malaysia, like other ASEAN countries, has strongly employed the export-push policy and encouraged the development of high technological industries for up grading technology.

Generally, there are no restricted sectors for foreign investment, except those that produce supporting parts and components. These include plastic packaging material; plastic compound/masterbatch; plastic injection moulded components and parts for the electrical, electronics and telecommunications industry; paper packaging products; metal fabrication; and foundry products. However, these restricted sectors are open to foreign investment that complies with the specific equity policies and the requirements imposed on the projects granted manufacturing licences stipulated in ICA 1975.

In addition, in certain industries where local expertise and capabilities have developed to a satisfactory level, the government regulates the levels of foreign equity ownership. This is because the government has the objective to provide more opportunities for local manufacturers. This also shows the investment policy of this country to balance economic interest of domestic and foreign investors.

4.2.3 The Philippines

The Philippines, like other ASEAN countries, has limited ownership ratio of foreign investors with the objective to encourage domestic investors to take more part in business firms. The ownership restriction has been implemented relevant to the negative list (discussed below) where certain areas of investment require majority of local shareholder in the company. This also aims to secure such fields of business to be operated by local investors on the grounds of guarding national economic strength,

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means, which is controlled by the Foreign Investment Committee (FIC), through its guidelines. FIC guidelines are not law but they are enforced administratively.

and less dependence on foreign investment especially in public consuming industries.

The Foreign Investment Act 1991 has deregulated the ownership restriction in companies catering to the domestic market, except for the areas of activity contained in the negative list (APEC: 1998, RP-8). There is a move to further reduce the coverage of the negative list through the elimination of the specific laws that restrict foreign equity participation in the covered activities (ASEAN Secretariat: 1998, 34).

In the Philippines, the Constitution and other national laws impose minimum Filipino ownership requirements in certain areas of investments. These restrictions are embodied in the Foreign Investment Act, which provides a negative list having two component lists: A and B. List A includes all areas of investment in which foreign ownership is limited by mandate of the Constitution and specific laws. Under the Constitution, the ownership and management of the mass media is limited to citizens of the Philippines or to corporations or associations wholly-owned and managed by such citizens. Educational institutions, except those established by religious groups and mission boards, are limited to Filipinos or to corporations or associations at least 60% of whose capital is owned by Filipinos. The advertising industry and pawnshops are limited to Filipinos, or corporations or associations whose capital is at least 70% owned by Filipinos. Also the operation of public utilities and financing companies are reserved for Filipinos for at least 60% of the investment. Some sectors, such as retail trade business, are totally reserved for Filipinos requiring 100% Filipino ownership.

List B consists of more sensitive areas of activities and enterprises concerning security that are completely closed to foreign investment. These include: defence-related activities, such as the manufacture and distribution of firearms and explosives; the manufacture and distribution of dangerous drugs, all forms of gambling, night-clubs, bathhouses, massage parlours and other like activities, because of risks they

may pose to public health and morals; small and medium sized domestic market enterprises with paid-up equity capital of less than the equivalent of US$ 200,000, unless they have paid-in equity capital of US$ 100,000 and (i) involve advanced technology as determined by the department of Science and Technology or (ii) employ at least 50 direct employees; and export enterprises which utilise raw materials from depleting natural resources, and with paid-in equity capital of less than the equivalent of US$ 500,000.

Considering the areas of activities that are subject to the ownership restriction, the Philippines is mainly concerned for security, public order, health, and sensitive area of business, and does not employ this restriction as an instrument to prevent foreign investors from entering the Philippines economy. This rationale for ownership restriction is also applicable to all ASEAN countries.

However, the Ramos government has launched a new economic policy including:

> (1) Liberalisation in many areas of economy (such as services sectors);
> (2) Deregulation of business and industry;
> (3) Privatisation of most government owned and controlled corporations (such as power and energy);
> (4) In the long term, reduce dependence on the IMF and the World Bank for the financing of the requirements for development.
> (The Philippines BOI: 1998, economic policy)

This new economic policy of the Philippines is more liberalised and opens more industries to foreign investors, especially it offers more opportunities to foreign investors to invest in the areas that presently have been privatised. This process of national liberalisation is consistent with the regional liberalisation: open regionalism.

4.2.4 Singapore

In Singapore, there is no restriction on foreign ownership of business, except for national security reasons and in certain specific areas such as air transport, public utilities, newspaper publishing and shipping. Singapore has very few restrictions

because it has been an "entrepot port" free trade country for centuries, and it has developed into an open economy. Singapore welcomes and encourages trade and investment into the country, and opens almost all industrial sectors to foreign investors so that there are only few restrictions, as mentioned above. There are presently no plans to expand the list of restricted sectors, and the basic objective of the Singapore government is to encourage free market policy. Also there are no laws or policies stating performance requirements. The Singapore government treats all contracts as commercial dealings (APEC: 1998, SIN-2).

Regarding the restricted sectors, the Singaporean government has a monopoly in the manufacture of arms and ammunition. There are also certain restrictions on foreigners acquiring equity interests in locally incorporated banks. The MAS has imposed a 40% ceiling on foreign ownership in local banks. The supply of public utility services such as electricity, water and gas is currently confined to the public sector, but public control is gradually being relaxed. Telecommunications are already privatised, while power supply has been separated from the supply of other utilities and is provided through a corporatised vehicle that many see as being a prelude to privatisation of power supply.

Since Singapore has already liberalised its investment regulations and adopted "Free Market Economy" it is complementary to the implementation of the open regionalism, and Singapore is more ready to open its industries to foreign investors, also to extend national treatment to foreign investor under the AIA.

4.2.5 Thailand

In Thailand, certain business activities are subject to the shareholding requirements stipulated in the Alien Business Law. The company, which production is mainly designed for domestic consumption or distribution, Thai shareholding must

equal not less than 51% of the registered capital[76]. But export-oriented projects with at least 50% production for export could be majority owned by foreigners. If 80% or more of the output is exported, foreigners can own 100% of the shares.

The Alien Business Law (No. 281) of Thailand prohibits aliens from conducting certain types of business. The scheme of this law is to divide all prohibited business into three categories, A[77], B[78] and C[79]. Categories A and B are prohibited to Aliens, but for category C business aliens must obtain a permit. In certain exceptional cases the Director-General of the Department of Commercial Registration, Ministry of Commerce may allow an alien to conduct a business that falls within Category B, should such business obtain privileges from the BOI[80].

Considering the case of Thailand, we can see the two main purposes of ownership restrictions. Firstly, they are related to the export-push policy, by encouraging foreign investors to invest in export-oriented industries so that they can

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[76]. The required percentage of Thai interests in Thai-foreign joint ventures in agriculture, livestock, fisheries, mining and services used to be 60%, now it is reduced to 51% as other sectors produce for domestic consumption.

[77]. Category A includes: agriculture (1) rice farming, (2) salt farming except rock salt; commerce (1) internal trade concerning local agriculture products, (2) trade in real property; Services (1) accounting, (2) Law, (3) Architecture, (4) Advertising, (5) Brokerage or agency, (6) Auction, (7) haircutting, hair dressing and beauty treatment; other business (1) building construction.

[78] Category B includes: agriculture (1) farming, (2) gardening (3) livestock farming & silk warm raising (4) forestry (5) fishery; industry (1) rice milling (2) manufacture of flour from rice & field crops, sugar, beverage, ice, drug, cold storage, wood processing, manufacture of casting of images of Buddha, wood carvings, lacquer ware, all type of matches, lime, cement, ply wood, wood veneer, chip-board or hard board, garments or shoes except for export, product from silk, cold storage, wood processing, stone blasting or crushing, printing press operation, newspaper publication; commerce (1) retailing excluding items in category C, (2) trade in ore excluding items in category C, (3) sale of food and beverage excluding items in category C, (4) trade in antique, heirlooms and fine art objects; Services (1) tour agency, hotel business, business under the law on services-providing establishment, photography, laundry, tailoring and dress-making; other businesses(1) internal transportation by land, water or air.

[79]. Category C includes: commerce (1) wholesaling of all types of products within the country except those specified in category A. (2) export of all types of products (3) retailing of machines, engines and tools (4) sale of food and beverage for the promotion of tourism; industry and handicrafts (1) manufacture of animal feed (2) extraction of vegetable oil (3) manufacture of embroidered and knitted products including weaving, dying and pattern printing (4) manufacture of glass containers including light bulbs (5) manufacture of crockery (6) manufacture of writing and printing paper (7) rock salt mining (8) mining; services , all service business except for those specified in category A. and category B and other construction except as specified in category A.

[80]. Even though in theory an alien can ask for permission to engage in business listed in Category C, in practice permission is only feasible after the designated business activity obtains BOI privileges.

fully-own or have a majority control over the company. This also facilitates the equilibrium of the balance of payments. The Thai government is concerned about the excess importation of intermediate inputs and raw materials from abroad by foreign investors, so that if the foreign owned company intends to export a higher proportion of its product, this can be used to offset the importation of inputs. Therefore, the Thai government allows a high ratio of foreign equity in such a case. The second objective is, like other ASEAN countries, to balance the economic interests of domestic and foreign investors, to secure public order, health, and securing sensitive business sector. Thai investment policy is actually influenced by "the trade-oriented investment pattern" (discussed below). This investment pattern is complementary to the open regionalism that relies on market driven factors more than regulatory function.

4.3 Performance Requirements

Almost all ASEAN countries apply performance requirements to foreign investment but many requirements are equally applied to local industries as well. Only Singapore does not have any performance requirements imposed on any investments.

The main purpose of the imposition of performance requirements is to gear industries toward national economic development schemes or plans. For instance, local content requirements are needed to promote domestic industries and to ensure that foreign firms do not just operate a 'screwdriver' plant by importing all parts and intermediates or inputs from abroad. Therefore a certain level of local content is generally required. Export performance requirements are also used to promote the export-oriented policies of ASEAN countries and to ensure equilibrium in the balance of payments. Thus governments require a balanced proportion of exports to imports or a higher proportion of exports to maintain the countries' international reserves.

The Malaysian government has applied a local content programme for motor

vehicles which is encouraged through administrative measures. The objective of this local content stipulation is to develop industrial projects including supporting industries to strengthen the industrial structure and enhance linkages between Small- and Medium-scale Industries (SMI) and larger firms. The programme was introduced for passenger and light commercial vehicles in 1991. So the rationale for the programme is to achieve an upgrading of engineering and technical skills in the infant component-parts industry.

The other three main economies: Indonesia, the Philippines and Thailand have used performance requirements as follows:

In Indonesia, there are three outstanding decrees[81] in effect which stipulate local content requirements for motor vehicles industries. The reason for this measure is to support and encourage the development of the automotive industry in Indonesia by regulating the local content rates of domestic motor vehicles or components with the incentive of differentiated import duty rates. The decrees are also designed to strengthen domestic industrial development by fostering technological advancement as well as the enhancement of industrial design and engineering ability in this sector.

The Indonesian government also stipulates local content requirements in certain industries, such as the utility boiler industry[82], soyabean cake manufacturing[83],

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[81]. Presidential Decree No. 54 dated 10th June 1993 regarding the list of sectors that are closed for capital investment, which requires that all new investments in the motor vehicles sector comply with the local content rates in effect as implemented by existing manufacturing; Decree of the Minister of Industry No. 114/M/SK/1993 date 9th June 1993 regarding the determination of local content rates of domestically made motor vehicles or components; and Decree of the Minister of Finance No. 645/KMK.01/1993 dated 10th June 1993 regarding the relief of import duty on import of certain parts and accessories of motor vehicles for the purpose of assembling and/or manufacture of motor vehicles.

[82]. The utility boiler industry is normally closed to foreign investment, except those that comply with the local content requirement as implemented by existing manufacturing. This is stipulated in the President Decree No. 54 dated 10th June 1993.

[83]. A ratio of domestically produced soybean cake to imported cake is specified to 3 weight units to 7 units, and applied to all cattle feed processing industries recognised as imported producers who are allowed to import and produce soybean cake. Decree of the Minister of Trade No. 126/KP/VI/1994 dated 27th June 1994 regarding the ratio between imported soybean cake and absorption of domestically produced soybean cake.

and the milk processing industry[84]. Compliance with these measures is mandatory for all enterprises, including those domestically-owned, and is enforceable under domestic law. Even though there was no formal provision for phasing out these requirements in the decrees, the government of Indonesia declared its intention to progressively eliminate the local content requirements in motor vehicles and components, utility boilers, soyabean cake and fresh milk over five years from 1993, consistent with Art. 5.2 of the Agreement on TRIMs.

In the Philippines, Local Content and Foreign Exchange Requirements have been applied under the Car Development Programme (CDP), Commercial Vehicle Development Programme (CVDP), and the Motorcycle Development Programme (MDP)[85], which aim to develop a viable automotive parts and components manufacturing sector. Participants in the CDP, CVDP and MDP are required to comply with the local content requirement in order for them to remain in the programme. From a list of locally produced automotive parts and components, the automotive assemblers can select which automotive parts they wish to manufacture for themselves or source locally in order to meet the local content requirement.

Automotive assemblers are also required to earn foreign exchange through exports of automotive parts and components to finance a proportion of their imports of completely knocked down (CKD) and semi-knocked down automotive parts and components for the assembly of motor vehicles[86].

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[84]. In order to ensure the availability of raw material supply for this sector and to ensure the absorption of the domestic fresh milk production, the Indonesian government has applied mixing ratio between imported raw material of milk and the production of domestic fresh milk. The ratio of domestic fresh milk is applied for the processing milk industries and state-trading companies were appointed to import of milk raw material. Decree of the Minister of Trade No. 58/KP/IV/1995 regarding the ratio between imported fresh milk and absorption of domestically produced fresh milk.

[85] The measures are covered by the following Executive Order (EO) and Presidential Memorandum Order (MOS) and are applied to new entrants and all existing participants in the CDP, CVDP and MDP that are registered with the BOI.

[86]. The local content requirement extends participation in CDP to ASEAN Industrial Joint Venture (AIJV) project proponents, for projects endorsed by the Government. The Memorandum Order 242

Thailand has applied local content requirements to both local and foreign investment in certain industries. These performance requirements are provided in the Factory Act (B.E.2535) and the Investment Promotion Act (B.E.2520). Section 32 of the Factory Act (B.E.2535) empowers the Minister of Industry to determine, upon the approval of the Cabinet of Ministers, product items, quality, ratio of raw materials, sources of raw materials, and factors and/or the kinds of energy to be used in the production of certain finished goods. To date, administrative rulings in the form of Ministry Announcements have been issued under this authority imposing only a local content requirement for domestically assembled motor vehicles, with the objective of establishing and developing the domestic automotive parts industry in Thailand.

Even though Thailand maintains the application of these performance requirements for the existing promoted projects which operated before the issuing of the new law, Thailand has abolished local content requirements from 1st April, 1993 for new projects after the five-year transitional period provided in Art. 5.2 of the Agreement on TRIMs.

Section 20 of the Investment Promotion Act (B.E.2520) authorises the Board of Investment to grant special investment incentives to industries and firms that agree to comply with certain production conditions. One of those conditions is that the firms use pre-determined proportions of locally produced raw materials in the production of certain product items. The types of raw materials or inputs and the percentages of local content requirement are fixed for each industry, and may be changed from time to time, to encourage the establishment of different industries for economic development purposes.

Local content requirements are currently applied to 13 products: passenger

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further requires participants under the AIJV scheme to earn 100% of their foreign exchange requirements for imports of CKD units for assembly.

cars, vans and other types of passenger cars, small vans and trucks, motorcycles, milk and dairy products, coated aluminium sheets for printing, television picture tubes, transformers, gas pressure thermostats, polystyrene sheet and film, transmission assembly, compressors for air-conditioners and passenger cars and pick-up trucks with chassis and windshield, which are subject to excise tax exemption.

So we can see that all ASEAN countries have the same main investment policies: to promote export-oriented industries by using export-performance requirements; to promote and upgrade specific local industries by imposing local content requirement; and to maintain a trade balance by restraining investors from importing more than an equivalent amount or some proportion of exports.

As discussed in chapter 1.2.2, the TRIMs agreement as part of Uruguay Round package establishing the WTO required member states to phase out certain trade-related performance requirements. TRIMs agreement requires the elimination of any TRIM which is inconsistent with article III or XI of the GATT, and the Annex to the agreement provides an "illustrative list" of such measures. It cover both mandatory measures and those "necessary to obtain an advantage", and includes

- local sourcing;
- trade balancing;
- import restrictions;
- foreign exchange balancing;
- export restrictions.

Developing country members were given a 5-year transitional period to comply. As mentioned above, ASEAN countries declared their intention of complying with TRIMs within this timescale. However, in August 1999 some ASEAN countries, i.e. Malaysia, expressed the necessity to extend the deadline, and this is still under consultation[87].

[87] Under Art. 5.3 the Council for Trade in Goods may, on request, extend the transition period for the

4.4 Investment Incentives

Most ASEAN countries grant both tax and non-tax incentives extensively in order to attract foreign investment. However, incentives must be approved by the relevant authority, thus foreign investors are subject to registration or licensing as well as the approval process discussed above. General features of incentives granted by ASEAN countries are tied to particular commodities, geographical areas, or export of goods produced, and generally based on discretion. Thus besides the objective of attracting FDI, incentives have also been used as tools to enhance economic development. The main objectives of the ASEAN countries in promoting investment are: to strengthen ASEAN's industrial and technological capability, to use domestic resources, to create employment opportunities, to develop basic and support industries, to earn foreign exchange, to contribute to the economic growth of regions or remote areas, to develop infrastructure, to conserve natural resources, and to reduce environmental problems[88]. Therefore investment promotion is always in line with the investment regime, and promotion of trade. For instance, the promotion of the electronics industry is to support the export of electronic goods to world markets. The following is a brief summary of incentives provided by ASEAN countries.

4.4.1 Indonesia

In Indonesia, the efforts in investment promotion are always in line with promotion in trade, thus the investment regime and policies on trade are

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elimination of TRIMs in the case of a developing country which demonstrates particular difficulties in implementing the provisions of the Agreement.

[88]. It is worth noting that in fact ASEAN countries all encourage a high standard of environmental protection, evidenced by the requirements for investors to comply with environmental law. If any investors, both local and foreign investors, comply strictly with environment law or have special environmental protection technology they would be entitled to special incentives. Moreover, if any investors fail to comply with environmental law or are involved in activities dangerous to the environment they might be refused the right to operate or even be denied incorporation.

complementary[89]. Indonesia, like most ASEAN countries, promotes manufacturing industries aiming at increasing exports, and also enhancing investment. In order to ensure the security of foreign investment, the Indonesian government not only provides investment incentives to investors but also guarantees the free transfer abroad of all company profits, proceeds from sale of shares, compensation in the case of nationalisation and repatriation of remaining investment capital in the case of liquidation as well as fees and payments to expatriates without any restriction (this protection has been provided in the BITs as discussed in section 4.5.2 below).

The government of Indonesia provides investment incentives in various ways. They are:

> (1) exemption or reduction of import duty on importation of main machinery, equipment, spare parts and auxiliary equipment, and raw materials;
> (2) exemption or reduction from income tax on the importation of capital goods and raw materials;
> (3) exemption from transfer of ownership fee for ship registration deed/certification made for the first time in Indonesia, but not more than two years after commercial operation;
> (4) deferment of payment of VAT on the importation of capital goods directly related to the production process;
> (5) postponement of VAT and sales tax on luxury goods and materials needed to manufacture export products.
> (ESCAP: 1995)

For firms which export no less than 65% of their production, additional incentives are permission to import whatever materials which are required regardless of the availability of comparable domestic products, and drawback of import duty and surcharges of imported goods and raw materials used in production, or on imported components of identical goods and materials purchased locally from an importer or another local producer. The same facility also applies to imports that are exported without processing. The Indonesian government also provides non-tax incentives. Losses may be carried forward for 5 to 8 years and the depreciation rate for

[89] ESCAP (1995) Publication of the Regional Seminar on "Investment Promotion and Enhancement of the role of the Private Sector in Asia and the Pacific", held on 26-30 January, 1993, at Dhaka, Bangladesh. Bangkok: ESCAP.

depreciable assets ranges from 5% to 50%.

Considered from the incentives provided and the requirements for obtaining such incentives, it clearly shows that the Indonesian investment regime aims to attract FDI in particular areas, as mentioned, export-oriented industries, manufacturing industries and sophisticated technology industries in order to up grade the country's technology. This, in return, promotes industrialisation of the country.

4.4.2 Malaysia

Malaysia has given investment incentives in manufacturing and agricultural sectors, as well as the tourism industry. This means Malaysia promotes more general industrial sectors. In Malaysia, many tax and non-tax incentives may be granted to a promoted investment. These include exemption from income tax[90] for "the pioneer status" company, an investment tax allowance, a reinvestment allowance, an export credit refinancing scheme, double deduction of export credit reinsurance premiums, double deduction for promotion of exports, and an industrial building allowance. There are also packages of incentives granted to research and development in industry. There are various allowances and deductions as well as tax exemptions. Other incentives are deduction for capital expenditure on approved agricultural projects, incentives for the tourism industry, and tariff protection.

In the sector of manufacturing industries, exemption from import duty on raw materials, machinery, components; drawback of excise duty on parts, ingredients or packaging materials; drawback of sales tax on materials used in manufacture; exemption from import duty and sales tax on machinery and equipment, as well as drawback of import duty, are granted.

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[90] For the manufacturing sector, a company given pioneer status will be granted partial exemption from the payment of income tax. It will only have to pay tax on 30% of its statutory income (APEC: 1998, MAS-15). High technology industries given pioneer status will be entitled to full tax exemption. Malaysia, Ministry of International Trade and Industry (MITI) (1999) *Information on Investment in*

All incentives granted would facilitate the operation of business/industry so FDI in Malaysia would gain advantages from these varieties of incentives in addition to other comparative advantages of this country such as low-cost labour and natural resources. Malaysia emphasises a technological up-grading policy and recently has created and promoted a "Mega-City"[91] which is well equipped with sophisticated technology providing superb infrastructure for industry and commercial business. These efforts Malaysia also facilitate regional investment liberalisation, and provide a favourable investment environment to foreign investors who intend to invest in the region.

4.4.3 The Philippines

The Philippines government adopts two major thrusts for the country i.e. global excellence and competitiveness and people-empowerment and human development[92]. The Philippines BOI has set as its objective the development of internationally competitive industries in order to attain these twin goals. Thus emphasis is being given to increasing the production capacity and enlarging the markets of export products. Additionally, the Philippine government is identifying and promoting new export products that would take advantage of the country's strategic location to attract foreign investment. Therefore, many investment incentives have been granted to foreign investors.

Malaysia, government announcement, as of December 1999.

[91] For instance, investment in the multimedia super corridor located in Mega City will be granted tax and non-tax incentives: be provided a world-class physical and information infrastructure; allowed unrestricted employment of knowledge workers from overseas; ensured freedom of ownership of companies; allowed freedom of sourcing capital globally for MSC infrastructure and freedom of borrowing funds; provided competitive financial incentives including no income tax for up to 10 years or an investment Tax Allowance, and no duties on the import of multimedia equipment; become a regional leader in intellectual property protection and cyberlaws; ensured no censorship of the Internet; provided globally competitive telecommunication tariffs; tendered key MSC infrastructure contracts to leading companies willing to use the MSC as their regional hub; and provided a high-powered implementation agency to act as an effective one-stop super shop to ensure the MSC meets company needs (MITI: 1999).

[92] See Far East Bank and Trust Company (1999).

In the Philippines, the Omnibus Investment Code of 1987 grants preferential tax and other benefits to all companies in preferred areas of investment, as identified in the investment priorities plan (IPP). Additional incentives are available to projects locating in less developed areas, to enterprises registered with the Export Processing Zone Authority (EPZA), and to multinational enterprises establishing headquarters in the Philippines[93]. Fiscal incentives include:

> an income tax holiday, tax and duty free importation of capital equipment, deduction for labour expenses, tax credit on domestic capital equipment, exemption from contractor's tax, tax credit on domestic breeding stock and genetic materials, access to bonded manufacturing and trading warehouse systems, exemption from taxes and duties on imported supplies and spare parts for consigned equipment, exemption from wharfage dues and any export tax, duty imposed and fees (APEC: 1998, RP-26).

Non-fiscal incentives provided include the simplification of custom procedures, unrestricted use of consigned equipment, and employment of foreign nationals. Additional incentives for less developed areas enterprises are granted to those companies located in such areas. 100% of the cost of necessary and major infrastructure and public facilities constructed can be deducted from taxable income, and deductions may be carried over to subsequent years until the total amount is deducted. Deduction for labour expenses is also doubled.

Firms registered with the EPZA are entitled to all the incentives given to firms registered with BOI, and they are also entitled to special tax treatment on merchandise within the zone; exemption from local taxes, licences, and fee; exemption from real estate taxes on production equipment and machinery not attached to real estate; exemption from the 15% branch profits remittance tax on profit remitted by a branch to its head office; exemption from SGS inspection.

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[93]. TNCs establishing headquarters in the Philippines are entitled to a withholding tax of only 15% on gross income received from the regional or area headquarters, tax and duty free importation of personal and household effects, travel tax exemption, multiple-entry visa of the foreign expatriates. The regional headquarters are entitled to exemption from income tax and contractor's tax, exemption from all kinds of local licences, fees, and duties, tax and duty free importation of training and conference materials, importation of motor vehicles for expatriate executives and their replacement every three years.

The Philippines government has adopted a new investment policy to encourage the entry of foreign investment into the country by allowing non-Philippine companies and individuals to invest in almost any type of business (subject only to negative list, which is gradually reduced)[94]. For those who invest in preferred and pioneer industries, there are incentives such as income tax breaks, tax free importation of equipment, and additional labor expense deduction, among others. These more favourable regulations clearly facilitate the implementation of open regionalism.

4.4.4 Singapore

The government of Singapore actively encourages foreign investment. The principal investment incentives are consolidated in the Economic Expansion Incentives Act and are administered primarily by the Economic Development Board (EDB) (APEC:1998, SIN-5). EDB was set up in 1961 as a one-stop agency to spearhead Singapore's industrialisation drive through investment promotion in manufacturing. Presently, Singapore is more advanced than any other ASEAN country in its industrialisation and its high technology industries. TNC networks from all over the world have established in this country so that further its economic progress and encourage inflows of trade and investment into the country even more. Being a free economy, Singapore has already liberalised its investment regulations and comprehensively provides investment incentives to both local and foreign investors.

In Singapore, as mentioned, the Economic Development Board (EDB) administers tax incentives under the Economic Expansion Incentives Act, which provides incentives in various categories. A pioneer status company is entitled to the exemption of 27% tax on profits arising from pioneer activities and the tax relief period is 5-10 years. Expansion incentive gives exemption of 27% on profits in excess

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[94] Far East Bank and Trust Company (1999) *Doing Business in the Philippines.* Manila: Far East Bank and Trust Company.

of the pre-expansion level, and the tax relief period is up to 5 years, with provision for extension. The investment allowance incentive exempts taxable income of an amount equal to a specified proportion of new fixed investment (up to 50%). Operational headquarters will be granted the incentive that income arising from the provision in Singapore of approved services will be taxed at 10%, and other income from overseas subsidiaries and associated companies may also be eligible for effective tax relief, and this incentive will be up to 10 years with provision for extension. Export of services will be entitled to 90% of the qualifying export income being exempted from tax and the tax relief period is 5 years, with provision for extension. Post-pioneer incentives will be granted to the company by reducing the corporate tax rate to 15% for up to 10 years. The venture capital incentive is that if losses are incurred from the sale of shares, up to 100% of equity invested can be offset against the investor's other taxable income. The international direct investment incentive is that if losses are incurred from the sale of shares or liquidation of the overseas company, up to 100% of equity invested can be offset against the investor's other taxable income. The approved foreign loan scheme gives exemption from withholding tax on interest, and the approved royalties provision gives full or partial exemption of withholding tax on royalties. Also, double deduction for research and development expenses is granted to approved projects.

Actually, investment incentives granted by Singapore are similar to those given by other ASEAN countries but with a more open economy and more liberalised investment regime without restriction on FDI entry and foreign equity, Singapore gains more advantages in attracting foreign investors. This can be seen from the huge inflows of FDI and the trade volume of this country (Asia Pulse Pte Ltd: 1999) despite

its small size. The economic success of Singapore helps encourage other ASEAN countries to follow suit, especially when the AIA has been fully implemented. A country with a more liberalised investment regime, like Singapore, will attract non-ASEAN investors to establish themselves in the country (discussed in chapter 5, section 5.3.6).

4.4.5 Thailand

Two major laws affecting foreign investment are the Investment Promotion Act of 1977 and the Alien Business Law of 1972. The Thai government has consistently maintained favourable attitudes towards foreign investment. There are no prohibitions or restrictions on foreign investment *per se.* But foreign investors may be subject to the Alien Business Law when it is applicable[95].

Under the Investment Promotion Act, the Board of Investment (BOI) may approve the promotion of investment projects in agriculture, animal husbandry, fishery, mineral exploration and mining, manufacturing and services when it considers that the products, commodities or services:

> (1) are either unavailable or insufficiently available in Thailand or are produced by an outdated process;
> (2) are important and beneficial to the country's economic and social development, and to national security; or
> (3) are economically and technologically appropriate, and have adequate preventive measures against damage to the environment.
> (Investment Promotion Act 1977, Art. 16)

Apart from the Alien Business Law Act 1972, all industries are open to foreign investors, and if they reach the criterion set forth by the BOI they will be approved to

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[95] The Alien Business Law is applicable only to natural persons and juristic persons who are: (1) a juristic person with majority foreign shareholding; (2) a juristic person, at least one-half of the number of shareholders, partners or members of which are aliens; (3) limited partnership or registered ordinary partnership having an aliens as managing partner or manager. The Alien Business Law sets three categories of business activities where foreign legal entities defined above are (1) prohibited (category A); (2) Permitted only with the Board of Investment promotion (category B); (3) implemented only with the permission of the Ministry of Commerce of Board of Investment promotion (category C). However The Alien Business Law does not apply to aliens in business with the permission of the Royal Thai Government, or covered by an agreement between the Royal Thai Government and foreign government which excludes certain activities. (BOI, 1999: 10), Alien Business Law Act 1972, Annexes

be "promoted projects" entitled to incentives. In Thailand, tax incentives are available to both local and foreign investors. Major incentives include tax holidays, exemption or reduction of import duties on machinery, and exemption or reduction of taxes on imported raw materials.

The magnitude of incentives granted depends on the location of investment projects in order to implement the industry decentralisation policy. Decentralisation is one of the aims of the Eighth National Economic and Social Development Plan of Thailand. Thailand has encountered the problem of urbanisation, and all development has centred in Bangkok and the central area. Therefore, the decentralisation policy has been adopted, and this can be realised through the creation of job and the allocation of industries to peripheral and remote areas for bringing in those areas of technology, jobs, and a high standard of living so that development would be evenly distributed throughout the Kingdom. BOI has implemented this policy by encouraging the location of investment in peripheral and remote areas, in doing so investment will be given more privileges and incentives (The Council of Ministers, 1997: The National Social and Development Plan).

In order to encourage industrial decentralisation, the country is divided into three zones with varying degrees of incentives. Remote areas are granted more incentives. In Zone I, Bangkok and neighbouring provinces, the promoted investment is entitled to 50% of import duties on machinery for projects exporting not less than 80% of production, exemption of corporate income tax for three years for projects exporting not less than 80% of output and located in industrial estates or promoted industrial zones, and exemption of import duties on raw materials for one year for projects exporting not less than 30%. In Zone II, provinces in the central part of

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attached to the Announcement of the National Executive Council (Alien Business Law Act 1972).

Thailand outside zone I, promoted investment is entitled to 50% reduction of import duties on machinery, and exemption of corporate income tax for three years, extendable to 7 years for projects located in industrial estates and promoted industrial zones, and exemption of import duties on raw materials for one year for projects exporting not less than 30%. In zone III, which is the rest, the promoted investment is entitled to exemption of import duties on machinery, exemption of corporate income tax for 8 years, exemption on import duties on raw materials for five years for projects exporting not less than 30%, and 75% reduction of import duties on raw materials used in manufacture for local distribution for 5 years.

In order to encourage industrial development in underdeveloped regional areas, the BOI offers tax incentives to existing activities, which may or may not have been promoted, if they relocate from the central to other regional areas. Relocating operations will receive the standard non-tax and tax incentives, exemption from corporate income tax, double deduction from taxable income of water, electricity and transportation costs, and deduction from net profit of 25% of the cost of installation or construction of the project's infrastructure facilities. As technological development is one of the most important policy objectives, additional tax incentives are granted to projects that invest in research and development activities.

This clearly shows that the investment policy of Thailand is geared towards the national economic and development policy. Therefore, the government encourages both appropriate and high technological industries, export-oriented industries, investment with high standard of environmental protection measures, and investment located in remote areas. Considering from these conditions we can see that a certain level of screening is maintain in this country. However, the Short-term Measures and the AIA scheme that Thailand has committed will ensure that Thailand will liberalise

its investment regime further and open up all industries to both ASEAN and non-ASEAN investors. This is evidenced by the passages of new regulations by Thai government such as to reduce negative list in the Alien Business Law Act[96]; to allow 100% of foreign equity shareholding[97]; dramatically open industries[98], especially services sector such as banking, insurance, telecommunication[99]; This shows that Thailand further liberalises investment regime to implement the open regionalism.

4.4.6 Overview

ASEAN countries have used investment incentives to attract FDI. Moreover, they use them as instruments to compete with each other among ASEAN countries to attract FDI as well. This encourages foreign investors to take advantage of incentive shopping. Generally, however, these have taken the form of tax benefits rather than government grants (which are more often available in the richer developed countries). Competition in the granting of incentives among ASEAN countries may distort the efficient allocation of investment and further distort trade and investment flows in the region, or at least such incentives are just a windfall fortune for foreign investors since they are likely to invest in that country no matter whether incentives are granted or not. Also the use of operational restrictions is usually done as a condition of investment incentives.

In the area of market access, the liberalisation process of ASEAN countries has been selective and is focused mostly on export-oriented industries. A number of

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[96] The Foreign Investment Law 1999 has replaced the Alien Business Act Law 1972, and it reduces the negative list prohibited to foreign investors, mainly in commercial and service sectors (11 business).

[97] Thailand's commitment under the Short-term Measures is incorporated into national law by the Decree on relaxing ratio of foreign equity holding, 1 December 1998 (The Office of the Board of Investment, BOI Announcement).

[98] Thailand's commitment under AIA is incorporated into national law by the Decree on open up industries to foreign investors, 1 December 1998. The Office of the Board of Investment, BOI Announcement).

[99] Enforced by the Financial Institutions Law 1999 (Ministry of Finance, Announcement as of December 1999) also see Memorandum of Economic Policies of the Royal Thai Government.

countries have increased the level of foreign participation in certain sectors and allowed foreign participation in previously restricted or sensitive sectors. For instance, Indonesia changed to a negative list, reduced the sectors subject to the requirement of 100% equity, and substantially relaxed divestment requirements. The Philippines also increased the number of sectors open to foreign investment, and now allows foreign investors to lease private land for 50 years, and has suspended the nationality requirement in the case of ASEAN Projects or investment by ASEAN nationals. Thailand now allows wholly-owned foreign businesses to operate investments in basic infrastructure, public utilities development and transportation systems (ASEAN Secretariat, 1998a; CCH Asia Limited, 1998).

In the area of operational restrictions, governments have not been too eager to act unilaterally on this issue. However, some of the operational restrictions, such as local content requirements, are included in the TRIMs provisions, which require changes to national laws. In response to obligations under the TRIMs, restrictions have been reduced. In addition to the notification of investment measures, which all ASEAN countries have to comply with under the TRIMs agreement, they have also liberalised other aspects. Malaysia reduced its withholding tax on technical fees and royalties from 15% to 10%, and allowed exporters to keep a portion of export proceeds in a foreign currency account in Malaysia. The Philippines allowed greater participation by foreign investors in domestic economic activities, and also liberalised the land lease restriction and foreign exchange controls. Thailand abolished restrictions on the establishment of assembly plants and liberalised foreign exchange controls.

In conclusion, the investment regimes of ASEAN countries clearly show that all ASEAN countries carefully screen foreign investment, especially in controlling

equity and ownership participation of foreign investors. Generally, they prefer a minority of foreign investors[100], and particularly certain business areas have been closed to foreign investment or subject to approval from authority in certain industries that reach the set requirements. Investment incentives are granted under terms and conditions that comply with the countries' economic and development plans. So the policy of ASEAN countries is to welcome foreign investment as long as it meets the set requirements of the countries. ASEAN countries open the door but hang curtains to prevent dust and flies from entering. Thus investment liberalisation in ASEAN countries before the Asian crisis was subject to domestic laws and regulations as well as economic policy. Therefore, under such circumstances it was unlikely that ASEAN countries would unilaterally extend national treatment to foreign investors. It was not until recently when ASEAN launched the AIA scheme that NT and MFN treatment could be granted to both ASEAN and non-ASEAN investors (see chapter 5). Also the short-term measures dramatically alter national laws (see chapter 5) especially in two areas, i.e. allowing 100% foreign equity ownership and providing attractive investment incentives, both tax and non-tax incentives.

Considering the actual national laws and the development of investment regulations of ASEAN countries, it can be seen that ASEAN countries have cautiously liberalised their investment regimes. They still maintain FDI entry-screening measures, while encouraging inflow of foreign investment in particular areas by granting investment incentives. Under such circumstances, it seems that the process of

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[100]. This means that indeed ASEAN countries as well as many developing Asian countries relied on FDI only to a moderate degree in the past. Investment was mainly financed by domestic savings, which were exceptional high by international standards (ranging from 25 to 35% of GDP), perhaps caused by the restriction of foreign ownership. Nevertheless, the rise of foreign investment flows into the region has increased the need for capital on the part of local investors in the increasing projects that encountered the restriction of foreign equity. Therefore local investors had to turn to offshore loans since onshore loans bear higher interest than offshore ones. This in the end increased foreign debt to ASEAN countries in the private sector. The financial crisis in ASEAN countries was partly caused by the heavy offshore loans of investors in these countries.

open regionalism would progress at a slow pace if it relied solely on investment liberalisation at a national level. However, the Asian crisis in 1997 prompted ASEAN countries to actively liberalise investment regulation. This can be seen from the adoption of the Short-term Measures and the AIA scheme that dramatically changes the ASEAN countries' investment policy and laws (discussed in chapter 5). Consequently, the national and regional investment liberalisation complementarily facilitates and reinforces the process of open regionalism.

It is important to understand the pattern of investment liberalisation of countries in this region that is based on the trade-oriented investment approach[101], which means compensating the propensity for foreign investment to generate an excess demand for imports, by increasing exports. Trade-oriented FDI is welfare improving in both home and host countries because trade-oriented FDI implies investment in industries in which the home country has comparative disadvantages, so that investment has been shifted to a host country which has comparative advantages. The host country can be viewed as a production base (where cost of production is lower than in home countries), and the products can be distributed at a lower price both in the local and global market. This would accelerate trade between the two nations, and promote beneficial industrial restructuring in both countries. This can explain the pattern of FDI in ASEAN countries from developed countries, which was initially directed towards natural resource development in which home countries have comparative disadvantages, and towards some manufacturing sectors in which home countries have been losing their comparative advantages. FDI from developed countries in ASEAN countries has been regarded as export-oriented, occurring in less sophisticated and more labour-intensive industries, and with a higher share of local

[101] See Lizondo, Saul (1992: 15).

ownership. This FDI pattern interacted with the development of ASEAN countries' national investment laws, which facilitated the export-push policy of these countries. Therefore, ASEAN countries have employed a targeted industry strategy to screen FDI, and offered incentives to promote export-oriented industries. Investment liberalisation in these countries thus accompanies this policy, i.e. enhancing exports and encouraging trade flows from within and outside the region. This process fits well with open regionalism and also it fits well into the market mechanism and investment patterns.

Now I will discuss bilateral investment agreements concluded by ASEAN countries to analyse the protection of foreign investment in this region, and also to analyse whether or not ASEAN BITs help to liberalise the investment regime in these countries.

4.5 ASEAN Bilateral Investment Agreements

In this section, I will focus on the ASEAN BITs by comparing terms and conditions of each ASEAN countries' BITs that vary considerably. The variation is based mainly on the BIT model of some developed countries such as the UK model, the US model, the German Model, or Switzerland's, on which each ASEAN country has based its BIT. Moreover, each ASEAN country may also have its own bargaining position causing it to deviate from such models. Therefore, it appears that one ASEAN country may adopt various models of BIT according to who is its contracting party and under what circumstances they entered into the BITs.

The most important characteristic of ASEAN BITs, like other general BITs, is that they are based on national laws of the contracting parties, especially on pre-entry and establishment control on FDI (discussed below). Thus most BITs do not affect national laws and leave this issue to the host country's discretion. Even post-entry

national treatment allows the host country to impose non-discriminatory regulations and requirements to ensure the conformity of the FDI operation to the laws of the host country. These characteristics appear in all ASEAN BITs (see Table 6). Moreover, national treatment and MFN treatment are also subject to the national policy so that under certain circumstances foreign investors that are generally granted national treatment still are subject to some reservations. The purpose of BITs is to ensure the protection of foreign investment at least on the basis of an international standard. Therefore, it is clear that ASEAN BITs do not override or affect their existing investment laws. This is in contrast with the US model BIT, which grants national treatment or MFN treatment whichever is more favourable at both pre-entry and post-entry stage to foreign investors (discussed in chapter 3) which however no ASEAN country has yet accepted. Therefore, all ASEAN BITs remain their investment control model (discussed in chapter 5). Now I turn to discuss the ASEAN BITS, which are based on various models.

4.5.1 The US BIT Model

Firms from European countries and the US. have long invested in ASEAN countries and ASEAN countries entered into bilateral investment agreements with these capital-exporting countries after the 1960s, initially with a few countries such as Germany, the Netherlands and France. The US also concluded investment protection agreements with ASEAN countries in the 1960s but based mainly on the old model of the Treaty of Friendship, Commerce and Navigation (FCN). Recently ASEAN countries have also endeavoured to conclude BITs with other capital-exporting countries (see Table 3 below).

Table 3
Bilateral Investment Agreement concluded by ASEAN countries

Cambodia (2)

Parties	Signature	Entry into Force
Malaysia	Aug. 17, 1994	
Thailand	Mar. 29, 1995	

Indonesia (24)

Parties	Signature	Entry into Force
Australia	Nov. 17, 1992	July 29, 1993
Belgium–Luxembourg	Jan. 15, 1970	June 17, 1972
China	Nov. 18, 1994	Apr. 1, 1995
Denmark	Jan. 30, 1968	July 2, 1968
Egypt, Arab Republic of	Jan. 19, 1994	
France	June 14, 1973	Apr. 29, 1975
Germany	Nov. 8, 1968	Apr. 19, 1971
Hungary	May 20, 1992	Feb. 13, 1996
Italy	Apr. 25, 1991	June 24, 1995
Korea, Republic of	Feb. 16, 1991	Mar. 10, 1994
Kyrgyz Republic	July 18, 1995	
Lao People's Democratic Republic	Oct. 18, 1994	
Malaysia	Jan. 22, 1994	
Netherlands	Apr. 6, 1994	July 1, 1995
Norway	Nov. 26, 1991	Oct. 1, 1994
Poland	Oct. 6, 1992	July 1, 1993
Singapore	Aug. 28, 1990	Aug. 28, 1990
Slovak Republic	July 12, 1994	Mar. 1, 1995
Spain	May 30, 1995	
Sweden	Sep. 17, 1992	Feb. 18, 1993
Switzerland	Feb. 6, 1974	Apr. 9, 1976
Tunisia	May 13, 1992	
United Kingdom	Apr. 27, 1976	Mar. 24, 1977
Vietnam	Oct. 25, 1991	

Lao People's Democratic Republic (10)

Parties	Signature	Entry into Force
Australia	Apr. 6, 1994	Apr. 8, 1995
China	Jan. 31, 1993	June 1, 1993
France	Dec. 12, 1989	Mar. 8, 1991
Germany	Aug. 9, 1996	
Indonesia	Oct. 18, 1994	
Korea, Republic of	May 15, 1996	
Malaysia	Dec. 8, 1992	
Mongolia	Mar. 3, 1994	
Thailand	Aug. 22, 1990	
United Kingdom	June 1, 1995	June 1, 1995

Malaysia (42)

Parties	Signature	Entry into Force
Albania	Jan. 24, 1994	
Argentina	Sep. 6, 1994	
Austria	Apr. 12, 1985	Jan. 1, 1987
Bangladesh	Oct. 12, 1994	
Belgium–Luxembourg	Nov. 22, 1979	Feb. 8, 1982
Bosnia and Herzegovina	Dec. 16, 1994	
Cambodia	Aug. 17, 1994	
Chile	Nov. 11, 1992	

China	Nov.	21,	1988	Mar.	31,	1990
Croatia	Dec.	16,	1994			
Denmark	Jan.	6,	1992	Sep.	18,	1992
Finland	Apr.	15,	1985	Jan.	3,	1988
France	Apr.	24,	1975	Sep.	1,	1976
Germany	Dec.	22,	1960	July	6,	1963
Hungary	Feb.	19,	1993	July	8,	1995
India	Aug.	3,	1995			
Indonesia	Jan.	22,	1994			
Italy	Jan.	4,	1988	Oct.	25,	1990
Jordan	Oct.	2,	1994			
Korea, Republic of	Apr.	11,	1988	Mar.	31,	1989
Kuwait	Nov.	21,	1987			
Kyrgyz Republic	July	20,	1995			
Lao People's Democratic Republic	Dec.	8,	1992			
Mongolia	July	27,	1995	Jan.	14,	1996
Namibia	Aug.	12,	1994			
Netherlands	June	15,	1971	Sep.	13,	1972
Norway	Nov.	6,	1984	Jan.	7,	1986
Pakistan	July	7,	1995			
Papua New Guinea	Oct.	27,	1992			
Peru	Dec.	13,	1995			
Poland	Apr.	21,	1993	Mar.	23,	1994
Romania	Nov.	26,	1982	July	20,	1984
Spain	Apr.	4,	1995	Feb.	16,	1996
Sri Lanka	Apr.	16,	1982	Oct.	31,	1985
Sweden	Mar.	3,	1979	July	6,	1979
Switzerland	Mar.	1,	1978	June	9,	1978
Turkmenistan	May	30,	1994			
United Arab Emirates	Oct.	11,	1991			
United Kingdom	May	21,	1981	Oct.	21,	1988
Uruguay	Aug.	9,	1995			
Vietnam	Jan.	21,	1992			
Zimbabwe	Apr.	28,	1994			

Philippines (13)

Parties	**Signature**			**Entry into Force**		
Australia	Jan.	25,	1995	Dec.	8,	1995
Canada	Nov.	9,	1995			
Chile	Nov.	20,	1995			
China	July	20,	1992			
Czech Republic	Apr.	5,	1995			
(France*	June	14,	1976	July	1,	1976)
France	Sep.	13,	1994			
Italy	June	17,	1988	Nov.	4,	1993
Korea, Republic of	Apr.	7,	1994			
Netherlands	Feb.	27,	1985	Oct.	1,	1987
Spain	Oct.	19,	1993	Sep.	21,	1994
Thailand	Sep.	30,	1995			
United Kingdom	Dec.	3,	1980	Jan.	2,	1981
Vietnam	Feb.	27,	1992			

* This treaty will terminate on the entry into force of the new treaty between France and the Philippines, signed on September 13, 1994.

Singapore (13)

Parties	**Signature**			**Entry into Force**		
Belgium–Luxembourg	Nov.	17,	1978	Nov.	27,	1980
China	Nov.	21,	1985	Feb.	7,	1986
Czech Republic	Apr.	8,	1995			
France	Sep.	8,	1975	Oct.	18,	1976
Germany	Oct.	3,	1973	Oct.	1,	1975
Indonesia	Aug.	28,	1990	Aug.	28,	1990
Mongolia	July	24,	1995	Jan.	14,	1996
Netherlands	May	16,	1972	Sep.	7,	1973
Poland	June	3,	1993	Dec.	29,	1993
Sri Lanka	May	9,	1980	Sep.	30,	1980
Switzerland	Mar.	6,	1978	May	3,	1978

United Kingdom	July	22,	1975	July	22,	1975
Vietnam	Oct.	29,	1992			

Thailand (17)

Parties	Signature			Entry into Force		
Bangladesh	Mar.	13,	1988			
Belgium–Luxembourg	Mar.	19,	1986			
Cambodia	Mar.	29,	1995			
China	Mar.	12,	1985	Dec.	13,	1985
Czech Republic	Feb.	12,	1994	May	4,	1995
Finland	Mar.	18,	1994			
Germany	Dec.	13,	1961	Apr.	10,	1965
Hungary	Oct.	18,	1991	Oct.	18,	1991
Korea, Republic of	Mar.	24,	1989	Sep.	30,	1989
Lao People's Democratic Republic	Aug.	22,	1990			
Netherlands	June	6,	1972	Mar.	3,	1973
Peru	Nov.	15,	1991	Nov.	15,	1991
Philippines	Sep.	30,	1995			
Poland	Dec.	18,	1992	Aug.	10,	1993
Romania	Apr.	30,	1993	Aug.	20,	1994
United Kingdom	Nov.	28,	1978	Aug.	11,	1979
Vietnam	Oct.	30,	1991			

Vietnam (25)

Parties	Signature			Entry into Force		
Armenia*	Feb.	—,	1993			
Australia	Mar.	5,	1991	Sep.	11,	1991
Austria	Mar.	27,	1995			
Belarus	July	8,	1992			
Belgium–Luxembourg	Jan.	24,	1991			
China	Dec.	2,	1992	Sep.	1,	1993
Denmark	Aug.	25,	1993	Aug.	7,	1994
Finland	Sep.	13,	1993			
France	May	26,	1992			
Germany	Apr.	3,	1993	Prov. In force		
Hungary	Apr.	26,	1994	June	16,	1995
Indonesia	Oct.	25,	1991			
Italy	May	18,	1990	May	6,	1994
Korea, Republic of	May	13,	1993	Sep.	4,	1993
Lithuania	Sep.	27,	1995			
Malaysia	Jan.	21,	1992			
Netherlands	Mar.	10,	1994	Feb.	1,	1995
Philippines	Feb.	27,	1992			
Poland	Aug.	31,	1994	Nov.	24,	1994
Romania	Sep.	1,	1994	Aug.	15,	1995
Russian Federation	June	16,	1994			
Singapore	Oct.	29,	1992			
Sweden	Sep.	8,	1993	Aug.	2,	1994
Switzerland	July	3,	1992	Dec.	3,	1992
Thailand	Oct.	30,	1991			

* Signature date unavailable.

Source: ICSID Compilation of Investment Promotion and Protection Treaties as of November 1999 Oceana Publications, Inc. also available
at website http:// www. Worldbank.org/icsid/treaties.treaties.htm.

It is notable that the US has not re-concluded any new BITs[102] with ASEAN countries, although the US already had agreements based on the older FCN model protecting foreign investment with some of these countries. For instance, the US concluded a Treaty of Amity and Economic Relations with Thailand in 1966[103] and Vietnam in 1957[104], and also had a very old Treaty of Peace, Friendship, Commerce and Navigation with Brunei in 1850[105]. With the Philippines, the US concluded an Agreement relating to entry of nationals of either country into the territories of the other for purposes of trade, investment, and related activities[106]. The Philippines is also a signatory to the Convention establishing the Multilateral Guarantee Agreement. Since this country adopts the generally accepted principles of international law as part of the law of the country, the generally accepted principles of international law on the protection of properties owned by the aliens are therefore considered part of the Philippines law. The rest[107] had concluded Economic Co-operation Agreements with

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[102]. The Bilateral Investment Treaty (BIT) Program supports the key US government economic policy objectives of promoting US exports and enhancing the international competitiveness of US companies. The BIT program's basic aims are to protect US investment abroad in those countries where US investors' right are not protected through existing agreements such as treaties of Friendship, Commerce and Navigation; encourage adoption in foreign countries of market-oriented domestic policies that treat private investment fairly; and support the development of international law standards consistent with these objectives. See http://www.state.gov/www/issues/economic/7treaty.html.

[103]. Treaty of Amity and Economic Relations between The Kingdom of Thailand and the United States of America, signed at Bangkok on 29th May 1966. Entered into force on 8th June 1968. 19 UST 5843; TIAS 6540; 652 UNTS 253.

[104]. Exchange of notes constituting an agreement relating to the guaranty of private investments between the United States of America and Republic of Vietnam, signed at Washington DC, on 5th November 1957. Entered into force on the same day. 8 UST 1862; TIAS 3931; 300 UNTS 11.

[105]. Treaty of Peace, Friendship, Commerce and Navigation between the United States of America and Brunei signed in Brunei on 23rd June 1850. Entered into Force on 11th July 1853. 10 Stat. 909; TS 33; 5 Bevans 1080.

[106]. Agreement relating to entry of nationals of either country into the territories of the other for purpose of trade, investment, and related activities between the US and the Philippines. Exchange of notes at Washington, on 6th September 1955. Entered into force on 6th 1955. 6 UST 3030; TIAS 3349; 238 UNTS 109.

[107]. Economic co-operation agreement between Burma and the United States of America signed at Rangoon 21st March 1957. Entered into force on 9th October 1957, Economic co-operation agreement between Indonesia and the United States of America signed at Djakarta 16th October 1950. Entered into force on 16th October 1950, Economic co-operation agreement between the United Kingdom and the United States of America, signed at London 6th July 1948; applicable to the Federation of Malaya (Malaysia) and Singapore 20th July 1948. Economic co-operation agreement between Laos and the United States of America, with annex and exchange of notes, signed at Vientiane 9th September 1952. Entered into force 9th September 1952.

the US. However, the US did conclude investment guarantee agreements with some of the ASEAN countries, but unlike BITs they were mainly focusing on the purpose of investment protection excluding the liberalisation of investment regulations. The US entered into an investment guarantee agreement with Indonesia[108], Malaysia[109], the Philippines[110], and Singapore[111]. The areas covered by the agreements are: protection against unlawful nationalisation and expropriation; prompt, effective and adequate compensation in the event of nationalisation or expropriation, and of losses owing to such events as war or insurrection; free transfer of profits or capital and other fees; and settlement of disputes under the Convention on Settlement of Investment Disputes. These various agreements were not unique, and particularly the old model of Treaties of Friendship, Commerce and Navigation and the Economic Co-operation Agreements broadly covered all economic issues, not just investment. According to these agreements, investment protection accorded by ASEAN countries was mostly based on international law and also guaranteed fair and equitable treatment. They also provide National Treatment or Most-Favoured-Nation Treatment in certain respects to US investors[112]. However, the entry of foreign investors and any pre-entry requirements were subject to domestic laws and regulations. And this is a very common criterion that also applied to all ASEAN BITs concluded with European and other countries.

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[108]. The Exchange of Notes constituting an Agreement between the United States of America and Indonesia relating to Investment Guaranties signed and entered into force on 7th January 1967.

[109]. Exchange of Notes constituting an agreement between the United States of America and the Federation of Malaya relating to the Guaranty of Private Investments, signed and entered into force on 21st April 1959.

[110]. Exchange of Notes constituting an Agreement between the United States of America and the Republic of the Philippines relating to Guaranties under section 111 (b) (3) of the Economic Co-operation Act of 1948, as amended, signed and entered into force on 19th February, 1952.

[111]. Investment Guarantee Agreement between the United States of America and Singapore signed and entered into force on 25th March 1966.

[112]. This was linked to the close relationship between the US and some ASEAN countries on political grounds: for instance, the Philippines was a colony of the US and Thailand had American military bases on its territory according to the Manila accord to protect the region from a communist invasion into the region as Thailand has borders with Cambodia, Laos, and Vietnam which have been

The new model of US BITs, adopted in 1980, went beyond those of other countries in requiring pre-entry National Treatment, which in effect requires a treaty partner (see Tables 4 and 5) to allow free entry of foreign investors, subject only to a negative list of exceptions negotiated and offered at the time of the agreement. Moreover, the new model of US BITs, unlike the old one, provides US investors with six basic guarantees[113]:

1) to ensure that US companies will be treated as favourably as their competitors[114];
2) to establish clear limits on the expropriation of investments and ensure that US investors will be fairly compensated;
3) to ensure free transfer of funds[115] into and out of the host country using the market rate of exchange;
4) to limit the ability of the host government to require US investors to adopt inefficient and trade distorting practices[116];
5) to ensure the right of US investors to submit an investment dispute with the treaty partner's government to international arbitration[117];
6) to give US investors the right to engage the top managerial personnel of their choice, regardless of nationality.

In fact, the US BITs aimed to set the policy groundwork for broader multilateral initiatives in the OECD, and perhaps eventually in the WTO.

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endangered by communism in the past.

[113]. Press Release by the Bureau of Economic, Business and Agricultural Affairs, 14th January 1998.

[114]. This includes when the US investors seek to initiate investment and throughout the life of that investment, subject to certain limited and specifically described exceptions listed in annexes or protocols to the treaties.

[115]. This covers all transfers related to an investment, including interest, proceeds from liquidation, repatriated profits and infusions of additional financial resources after the initial investment has been made. This is to ensure the right to transfer funds creates a predictable environment guided by market forces.

[116]. From the US's point of view, performance requirement such as local content requirement or export performance requirements all are prohibited. This provision may also open up new markets for US producers and increase US exports. Thus the US investors protected by BITs can purchase US-produced components without restriction on inputs in their production of various products. They can also import other US-produced products for distribution and sale in the local market. They cannot be forced, as a condition of establishment or operation, to export locally produced goods back to the US

Table 4
The new US Bilateral Investment Treaties
(As of 14th January 1998)

Country	Date of Signature	Date Entered into Force
Albania	January 11, 1995	January 4, 1998
Argentina	November 14, 1991	October 20, 1994
Armenia	September 23, 1992	March 29, 1996
AzerbaiJan	August 1, 1997	----------
Bangladesh	March 12, 1986	July 25, 1989
Belarus	January 15,1994	----------
Bulgaria	September 23, 1992	June 2, 1994
Cameroon	February 26, 1986	April 6, 1989
The Congo	February 12, 1990	August 13, 1994
Croatia	July 13, 1996	----------
Czech Republic	October 22, 1991	December 19, 1992
Ecuador	August 27, 1993	May 11, 1997
Egypt	March 11, 1986	June 27, 1992
Estonia	April 19, 1994	February 16, 1997
Georgia	March 7, 1994	August 17, 1997
Grenada	May 2, 1986	March 3, 1989
Haiti	December 13, 1983	----------
Honduras	July 1, 1995	----------
Jamaica	February 4, 1994	March 7, 1997
Jordan	July 2, 1997	----------
Kazakhastan	May 19, 1992	January 12, 1994
Kyrgyzstan	January 19, 1993	January 12, 1994
Latvia	January 13, 1995	December 26, 1996
Lithuania	January 14, 1998	----------

market or to third-country markets.
[117]. This is to ensure that there is no requirement to use that country's domestic courts.

Moldovia	April 21, 1993	November 25, 1994
Mongolia	October 6, 1994	January 1, 1997
Morocco	July 22, 1985	May 29, 1991
Nicaragua	July 1, 1995	----------
Panama	October 27, 1982	May 30, 1991
Poland	March 21, 1990	August 6, 1994
Romania	May 28, 1992	January 15, 1994
Russia	June 17, 1992	----------
Senegal	December 6, 1983	October 25, 1990
Slovakia	October 22, 1991	December 19, 1992
Sri Lanka	September 20, 1991	May 1, 1993
Trinidad & Tobago	September 26, 1994	December 26, 1996
Tunisia	May 15, 1990	February 7, 1993
Turkey	December 3, 1985	May 18, 1990
Ukraine	March 4, 1994	November 16, 1996
Uzbekistan	December 16, 1994	----------
Zaire	August 3, 1984	July 28, 1989

Source: Bureau of Economic, Business and Agricultural Affair, US. Bilateral Investment Treaty

Table 5
An Example of the US Bilateral Investment Agreement Model

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

				non-discriminatory manner, upon payment of prompt, adequate and effective compensation	in accordance with the agreed procedure (3) submit to the ICSID	(2) the treaty shall not dero gate from laws, regulations and practice of either party; international obligation; obligations assumed by either party

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

It is interesting to note that all ASEAN BITs, either concluded with European countries or with the US as well as others, were all subject to domestic law regarding the establishment and control of foreign investment. However, ASEAN countries do accept the principles of international law regarding investment protection. This common feature clearly signals that ASEAN countries preserve their sovereign right in the liberalisation of investment regulations that they see fundamentally affecting their economy and security. They still need to make sure that foreign investors admitted are well controlled and contribute economic progress to their economies according to their plans and policies. But once they have accepted any foreign investors they are committed to grant protection to them at a level reaching the requirements of international laws and principles to ensure the security of foreign investors. This shows the firm commitment of ASEAN countries to the protection of foreign investors, and BITs have been regarded as an instrument to attract foreign investment in this sense. It is very important to emphasise that ASEAN countries prefer not to have their territorial jurisdiction removed by the liberalisation of foreign investment in absolute terms. There are far more factors to be taken into account in relation to foreign investment than just liberalisation. Social problems, security, environment, employment and culture may be affected by foreign investment in the host countries. These have been regarded and taken into consideration in the liberalisation of investment. Now I will discuss the ASEAN BITs concluded with

European countries, which also show the dichotomy between the restriction of foreign investment entry and the guarantee of protection of foreign investment.

4.5.2 ASEAN BITs concluded with European Countries

In most of their relationships, ASEAN countries are the recipients of inward capital flows and are agreeing to conditions of investment protection in the hope that more capital would flow into their territory from the traditional capital-exporting countries. They considered that a BIT could be a measure for attracting investment, since the existence of a BIT may be regarded as a guarantee of protection for foreign investors. In particular, uncertainties about the content of customary international laws on foreign investment, as well as the difficulty of concluding a binding multilateral investment agreement to protect foreign investors, are the main reasons for states to turn to bilateral investment agreements. Developed countries hoped that the guarantees in an intergovernmental agreement might be higher and more reliable than the domestic laws of the host countries. However, the vast majority of BITs actually concluded were not instruments for investment liberalisation but rather for protection of foreign investors from illegal expropriation/nationalisation and unfair compensation. BITs mainly leave the matters of entry and establishment to national discretion (Muchlinski, 1995: Ch. 17; UNCTAD, 1999: 16). This can clearly be seen in all ASEAN BITs that are subject to domestic laws and regulations as well as economic policy, ranging from admission requirements, treatment after establishment (e.g. the Malaysia divestment rules), transfer of profits and other returns from investment, and especially the pre-requisites for entitlement to investment promotion. Thus BITs do not affect the investment regimes, laws and regulations of ASEAN countries as discussed above. Even though all BITs of ASEAN countries include the National Treatment and Most-Favoured-Nation principles, the applicability of those

principles varies in particular instances and is still subject to domestic laws. If ASEAN BITs are regarded as one factor among many which may affect a potential investor's decision to invest in ASEAN countries, it is to ensure the stability and security of foreign investment in these countries but not for the reason that ASEAN uses BITS for investment liberalisation. Other factors are very important, such as the economic profitability of an investment, political stability of the host country, the legal framework, the investment climate or the favourable environment for investment that facilitates profit making by foreign investors. Political, economic and legal stability are the main investment determinants. From the legal aspect, investment law reform may nevertheless be important, particularly to strengthen regional economic integration to gain advantages from economies of scale through the enlargement of the regional market for trade and investment.

To show that ASEAN BITs are subject to domestic investment laws and regulations, and that in fact BITs do not interfere with the policies of ASEAN countries to screen foreign investment for economic development, the following section will analyse BITs between ASEAN countries and some European countries by making a comparison of these ASEAN BITs.

4.5.2.1 The comparison of the ASEAN BITs[118]

Table 6 shows that all bilateral investment agreements concluded between ASEAN member countries and the Western capital-exporting countries conform to a general pattern (discussed in chapter 3), although the terms used in the agreements were divergent. All ASEAN countries share the same common principle that admission of foreign investment is based on the domestic laws and regulations of the host countries, so that all foreign investments may be subject to a government

[118] The discussion in this section is the original analysis of the author based on the comparison of the ASEAN BITs in Table 6, which is compiled by the author.

screening process. This can be seen from the terms and conditions regarding this issue, in all ASEAN BITs. Thus, the BIT between Philippines and Germany stated in the attached Protocol that:

> "Either Contracting Party reserves the right to require as a pre-requisite to the admission of an investment within its territory a "certificate of admission" which it shall issue to investments it considers admissible pursuant to Art. 1"

Art. 2 (I) of the BIT between Indonesia and Britain also provided that:

> "This Agreement shall only apply to investments by nationals or companies of the United Kingdom in the territory of the Republic of Indonesia which have been granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1976 or any law amending or replacing it"

Art. 1 (b) of BIT between Malaysia and Britain similarly stated that:

> " in respect of investments in the territory of Malaysia, to all investments made in projects classified by the appropriate Ministry of Malaysia in accordance with its legislation and administrative practice as an "approved project".

Art. 2 of the BIT between Philippines and Netherlands provided that:

> "This Agreement shall apply only to investment brought into, derived from, or directly connected with investments brought into the territory of one Contracting Party by nationals of the other Contracting Party in conformity with the former Party's laws and regulations, including due registration with the appropriate agencies of the receiving Contracting Party, if so required by its laws".

Protocol (1) to Art. 1 of BIT between Thailand and Germany provided that:

> "in respect of investments in the territory of the Kingdom of Thailand the term "investments" wherever it is used in this Treaty, shall refer to all investments made in projects classified in the certificate of admission by the appropriate authority of the Kingdom of Thailand in accordance with its legislation and administrative practice as an "approved project".

The Singapore BITs clearly stated that the scope of agreement or the protection of foreign investors would cover only investments approved in writing. For example the BIT between Singapore and Germany[119] provided that:

> "in respect of investment in the territory of the Republic of Singapore, to all investments approved in writing by the Government of the Republic of Singapore irrespective of whether these investments were made before or after the coming into force of the present Treaty".

[119]. Art. 1 (ii) of BIT between Singapore and Germany.

This can be seen also in BIT between Singapore and France[120], which provided that:

> "The provision of this Agreement shall only extend to investments whether made before or after the coming into force of this Agreement which are specifically approved in writing by the contracting party in whose territory the investment have been made or will be made.

Also the agreement between Singapore and Germany further specifies that the admission of investment must be in accordance with the economic policy of the host countries[121]. BITs made by Indonesia with Britain, Norway and Belgium[122] state that investment must be subject to foreign investment laws and regulations (see Table 6) which are distinct from the general national law provided for the constitution of domestic companies (discussed in chapter 3).

Moreover, all ASEAN countries' BITs cover only investment made directly in the territory of the contracting party (see Table 6). Specifically, the BIT between Malaysia and Germany clearly defined the term "companies" as follows:

> "The term "Companies" referred to in paragraph (4) of Art. 1 shall not include a branch or branches of any juridical person, company or association which has its seat or is incorporated or constituted in the territory or by or under the laws of a third party"[123].

Generally, the objective of admission criteria for foreign investment of ASEAN countries is to screen out the entry of harmful foreign investments and also to seek to ensure that foreign investment which enters the ASEAN countries will continue to benefit the host countries, even after the commencement of the operation. The requirements to comply with internal laws and regulations of the host countries would cover performance requirements provided in such laws, which are usually

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[120] Art. 9 of BIT between Singapore and France.

[121]. Art. 2 (i) of BIT between Singapore and Germany provided that "Each Contracting Party shall endeavour to admit investment by nationals or companies of the other Contracting Party in accordance with its legislation and administrative practice within the framework of the general economic policy and to promote such investment as far as possible".

[122] See Art. 2 (1) of BIT between Indonesia and the Great Britain, Art. II of BIT between Indonesia and Norway, and Art. 2 of BIT between Indonesia and Belgium.

[123] Paragraph (1) of the Protocol attached to the BIT between Malaysia and Germany, dated 22nd

applied in conjunction with investment incentives packages (see ASEAN investment regime, laws and regulations discussed above). These usually require the export of an agreed-upon percentage of the production, compliance with planning and environmental controls, conditions for hiring local labour and also requirements related to repatriation of profits of the foreign investment.

Regarding post-entry treatment of foreign investors, even though all BITs guarantee the free transfer or repatriation of profit derived from the investment, they all subject this to the rules and regulations of the host countries, which allow for controls due to the balance of payment conditions or financial situation. For instance, Art. IV of the BIT between Thailand and Netherlands provided that:

> (1) Each Contracting Party is prepared, within the limits of its legislation, to facilitate the delivery of capital goods to, or the carrying out of public works for ...., and (2) In pursuance of transactions entered into under paragraph (1) above, each Contracting Party shall authorise, within the limits of its legislation the transfer, when due, of money owing to nationals of the other Contracting Party".

Also the BIT between Indonesia and Norway provided in Art. VII that:

> "Each Contracting Party guarantees, subject to and to the extent permitted by its laws and regulations, to the investors of the other Contracting Party, in respect of their investment, without delay the transfer of: .....".

The existence of these requirements, and the administrative mechanisms which supervise foreign investment to ensure that it complies with the conditions imposed, guarantee that foreign investment functions within a tightly regulated sphere of the host ASEAN countries' laws.

Even though all ASEAN BITs provided Most-Favoured-Nation treatment (MFN) and some BITs even grant National Treatment, the protection is subject to or under the limitation of the domestic laws of the host countries. For instance, Art. 2 (3) of BIT between Indonesia and Belgium provided NT/MFN treatment to investors

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December 1960.

from the contracting parties but this is subject to the *stipulations contained in the Protocol attached to the present Agreement*[124]. And Art. 2 of the Protocol attached to this BIT provided a reservation for Indonesia that:

> "For the purpose of protecting the Indonesian national economy, the Government of the Republic of Indonesia may grant some facilities to Indonesian concerns which do not fully apply to Belgian concerns".

Therefore, Indonesia need not extend some rights to investors from Belgium on the grounds of protecting the Indonesian national economy. Even though the Protocol further stated that MFN treatment still applies, nevertheless national treatment granted in the BIT is affected by this reservation.

Some agreements provided both MFN and national treatment, but the two treatments were applied to different cases and conditions or different fields of protection. The BIT between Thailand and Netherlands provided both National and MFN treatment for protection of foreign investment but each applies to different fields of protection, in Art. V, in respect of the payment of taxes, fees or charges and to the enjoyment of fiscal deduction, MFN treatment is required. But in Art. VI the protection of industrial property, national treatment is expected while Art. VII provides for MFN treatment for the protection of investment, goods, rights and interest of the investors of the other Contracting Party.

Foreign investment that does not comply with the conditions on which it was permitted entry can be subjected to fines, diminution of the rights that had been granted, and even to termination. Therefore, the admission of foreign investment on the basis of fair and equitable treatment, and even the treatment after the entry of such investment on the MFN basis or national treatment, is fundamentally based on laws

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[124]. Art. 2 (3) of BIT between Indonesia and Belgium provided that "the investment of nationals or legal persons of either Contracting Party in the territory of the other Contracting Party shall be accorded by such other Party, a treatment no less favourable than that which it accords in its territory to any similar investment owned by it own nationals or legal persons or by nationals or legal persons of third States with due regard to the stipulations contained in the Protocol attached to the present Agreement and the

and regulations as well as policies of the host ASEAN countries.

However, the ASEAN BITs do provide protection against nationalisation and expropriation, and also compensation in case expropriation takes place. Regarding expropriation and compensation, ASEAN countries accept the minimum standard rule that nationalisation or expropriation will take place only for public purposes and with prompt, adequate and effective compensation. Nevertheless, some agreements have divergent provisions; for instance, Thailand can apply the rules and regulations of the Bank of Thailand and also large transfers can be required to be made on an instalment basis[125]. Some agreements apply the rule of market value to the affected investment[126]. These variations are closely related to the internal policies, investment laws and investment regimes of each ASEAN country.

The dispute settlement measures provided in the ASEAN's BITs mainly refer to ICSID, but some BITs provide for preliminary measures for seeking amicable settlement between the parties, or by seeking remedies from local tribunals before bringing the case before an arbitration tribunal (see Table 6).

This comparison of the ASEAN BITs clearly shows that they do not over ride or affect ASEAN countries' national laws, and especially the entry of FDI may be subject to screening procedures and other requirements. Post-entry treatment of FDI is also still under control of ASEAN host countries. Next I compare the ASEAN Investment Agreement, which is entered into among the ASEAN countries themselves, with the ASEAN BITs to see whether or not it is different from the

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Protocol".

[125]. Protocol (4) (b) of BIT between Thailand and Germany reads that "in the case of transfers from Thailand under Art. 4 the Bank of Thailand may, when considerations regarding exchange market stability and balance of payments necessitate the introduction of measures to assure the availability of foreign exchange specify that large amounts shall be transferred in instalments of .....".

[126]. For instance, BIT between Indonesia and Britain, Art. 5 read that "...Such compensation shall amount to the market value of the investment expropriated." and BIT between Indonesia and Norway also provided in Art. VI that "Such compensation shall amount to the market value of the investment....".

ASEAN BITs, and its implications.

4.5.3 The ASEAN Agreement for the Promotion and Protection of Investments Agreement

The ASEAN Investment Agreement for the promotion and protection of investment, the only regional investment agreement in this region, was signed in 1987 between the six ASEAN countries. It was amended in 1996 when Vietnam became a member of ASEAN and acceded to the agreement. The ASEAN Investment Agreement is no different in form from the usual BITs. It requires that the investments, which are covered and protected under the agreement, must be specifically approved in writing and registered by the host country subject to such conditions as it deems fit for the purpose of the agreement. This is not only to ensure that investment admitted in the territory of ASEAN contracting parties is beneficial to the host countries and under the existing investment screening legislation, but also to meet the objective of the agreement to facilitate the industrial co-operation scheme under the Declaration of ASEAN Concord. There is also a provision that conditions may be imposed to ensure that the laws and regulations applying to foreign investment in each country are preserved.

In the ASEAN investment agreement, the treatment of foreign investment is based on the MFN standard. Art. IV (2) of the agreement provided that:

> "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 investors of the most-favoured-nation"

However, the agreement provides that two or more parties may negotiate to accord National Treatment, but such agreement shall not entitle any other party to claim national treatment under the MFN principle[127]. So it can be seen that even under the

[127] Art. IV (4) provided that " 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".

ASEAN Agreement for the Promotion and Protection of Investment, ASEAN countries were generally not willing to grant National Treatment to other countries, as they did not give National Treatment, even to their partners in ASEAN. Indeed, it is not until the launch of the AIA in 1998 that NT and MFN treatment has been extended to ASEAN and all investors (see chapter 5 below).

On expropriation and compensation, the agreement also applies the minimum standard principles, which requires the payment of adequate compensation based on market value, paid without unreasonable delay, and requires expropriation to be based on the non-discrimination principle, for the public interest and under due process of law. The dispute settlement clause can refer to ICSID if the parties desire. The agreement also provided an alternative of setting disputes by submitting to UNCITRAL or other regional arbitration bodies. Also, in the first instance, the parties should attempt to settle their disputes amicably between them before submitting the case to the arbitration tribunal.

Table 6
Comparison of some Investment Agreements concluded between ASEAN countries and some European countries, and the ASEAN Agreement for the Promotion and Protection of Investments

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

1969	contracting party	accordance with laws and regulations of Norway , within the territory of contracting party only	with laws and regulations on Norwegian side **Treatment Post-entry** MFN	interest at commercial rate	jurisdiction B. refer to ICSID	
Indonesia and Belgium 15 January 1970	Nationals and legal persons of the either contracting party	Only approved investment in accordance with the legislation and administration of contracting party, situated in the territory of the contracting parties only	**Admission Pre-entry** subject to its legislation but grant MFN treatment for admission **Treatment Post - entry** national treatment (similar investment), MFN treatment for the protection	**Expropriation** for public interest **Compensation** just compensation, actual price of the affected goods, MFN treatment	-Diplomatic channels within a six month period, if failed then submit to arbitral tribunal -Arbitration decision binding the parties	For the purpose of protecting Indonesian national economy, some facilities may only grant to Indonesian concerns
Malaysia and Britain 21 May 1981	On the British side : citizen of the UK and colonies, and any British subject and companies constituted under the law in force in the UK&northern Ireland On the Malaysian side : Malaysian nationals and companies	Investment made in the territory of either contracting party only, and must be an approved project under Malaysian laws. on the British side, investments made in accordance with its legislation	**Admission Pre-entry** subject to laws enforced in either contracting party **Treatment Post-entry** Most-favoured-nation treatment accorded fair and equitable treatment	**Expropriation** for a public purpose **Compensation** prompt, adequate and effective	Refer to ICSID	Exception from MFN treatment for the preference or privilege extend to custom union or free trade area by either party
Malaysia and Germany 22 December 1960	Nationals and companies lawfully constituted in accordance with its legislation of the that party	Investment admitted in accordance with their laws and regulations with in the territory of contracting party only, and on the Malaysian side, it must be an approved project in Malaysia	**Admission Pre-entry** subject to the approval process in Malaysia and in accordance with its legislation in Germany **Treatment Post-entry** MFN or National treatment	**Expropriation** for a public purpose **Compensation** prompt, adequate and effective compensation and freely transferable	1. Settle by the both governments 2. Arbitration and the arbitral decision is binding	Companies shall not include a branch(es) which has its seat or incorporated in the territory or by or under the laws of a third party
Malaysia and Belgium-Luxembourg 22 November 1979	Nationals and companies constituted in accordance with its legislation of that parties	Investment made in the territory of either contracting party in accordance with their laws and regulations, and on Malaysian side, it must be an approved project in Malaysia	**Admission Pre-entry** subject to the approval process in Malaysia and in accordance with its legislation in Belgium-Luxembourg **Treatment Post-entry** MFN treatment	**Expropriation** for a public purpose and non-discrimination **Compensation** prompt, adequate, and effective, freely transferable	A. amicable settlement, if not B. submit to ICSID	Repatriation of return of investment and others is freely transferred but subject to its laws and regulations
Malaysia and	Nationals and companies lawfully	Investment made in the territory of	**Admission Pre-entry** subject to its	**Expropriation** for public interest, under	Refer to ICSID	-Freely repatriation of return of

Norway 6 November 1984	constituted, having its seat or having predominating interest of that party	either contracting party in accordance with its legislation. On Malaysian side, it must be an approved project	right to exercise powers conferred by its laws, and screening process **Treatment** **Post-entry** MFN treatment	due process, non-discrimination **Compensation** prompt, adequate and effective, which is freely transferable		investment but subject to its laws and regulations -MFN treatment will not extend to existing or future REIO
Malaysia and Finland 15 April 1985	Nationals and companies lawfully constituted in territory of that party or having predominating interest of that party	Investment made in accordance with its laws and regulations in the territory of either contracting party, and on Malaysian side it must be an approved project.	**Admission** **Pre-entry** subject to approval and in accordance with its legislation **Treatment** **Post-entry** MFN treatment	**Expropriation** for a public purpose, non-discrimination and under due process of law **Compensation** prompt, adequate and effective, amount to market value and freely transferable	Refer to ICSID	-Freely repatriation of return of investment but subject to its laws and regulations -MFN treatment will not extend to existing or future REIO
Malaysia and Netherlands 15 June 1971	Nationals and companies lawfully constituted in accordance with its legislation of that party. On the Netherlands side, including companies controlled directly or indirectly by its national or legal person.	On Malaysian side, approved project On the Netherlands side, investment under the relevant laws and regulations	**Admission** **Pre-entry** in accordance with their legislation, and approval process **Treatment** **Post-entry** national treatment	**Expropriation** for a public purpose, under due process of law and non-discrimination **Compensation** prompt, adequate and effective	1. local administrative and judicial remedies 2. refer to ICSID	Including shipping services
Philippines and Netherlands 27 February 1985	Nationals and companies of either party. Companies lawfully constituted in the territory of that contracting party, and actually doing business in the territory of that party wherein a place of effective management is situated, and directly or indirectly controlled by the national or company of that party	Investment brought into, derived from, or directly connected with investment brought into the territory of either contracting party in conformity with their laws and regulations	**Admission** **Pre-entry** fair and equitable treatment **Treatment** **Post-entry** MFN	**Expropriation** for public use, in the public interest or national defence **Compensation** just compensation at the market value, without undue delay and freely convertible currency	Refer to ICSID	-Freely transfer of investment but subject to the right to impose equitably and in good faith such measures to safeguard the integrity and independenc e of its currency **- Exception of MFN** contracting party will not extend privilege and preference to custom union, free trade area, which they are a member
Philippines and Germany	Nationals and companies of either party. Interpretation of	Investment made in the territory of either	**Admission** **Pre-entry** accords to any similar	**Expropriation** for the public benefit **Compensation**	A. settle by the two contracting parties	**-Exception** MFN not included the privilege

3 March 1964	company base on the concept of the seat (siege social)	contracting party including the ones made prior to its enter into force of the agreement	investment in its territory, in accordance with laws and regulations, need certificate of admission and with fair and equitable treatment **Treatment Post-entry** MFN treatment	the equivalent of the investment affected, without delay	B. arbitration	grant to the US nationals and companies
Singapore and Britain 22 July 1975	British nationals include British, citizen of colonies, British subjects, and British protected person, and companies constituted under the British law. Singaporians and companies constituted the law enforced in Singapore	Investment specifically approved in writing by the contracting party in whose territory the investment have been made or will be made	**Admission Pre-entry** with fair and equitable treatment but subject to its right to exercise powers conferred by it laws to admit investment, **Treatment Post-entry** MFN and national treatment where applicable	**Appropriation** for public purpose **Compensation** prompt, adequate and effective compensation amount to the market value, made without delay and freely transferable	1. settled through diplomatic channel 2. arbitration	On British side, territorial extension covered any territory for whose international relations they are responsible but with the consent of the government of Singapore
Singapore and France 8 September 1975	Nationals and companies lawfully constituted under the law in force in that party. Company ,on French side, must has head office in France	Approved investment in writing in the territory of either contracting party	**Admission Pre-entry** fair and equitable treatment **Treatment Post-entry** MFN and national treatment	**Appropriation** for the public purpose, non-discrimination **Compensation** commercial value of the assets, without undue delay and free transferability	Refer to ICSID	**Exception** MFN treatment , privilege and preferential treatment accorded by virtue of regional arrangement by either contracting party will not extend to the other party
Singapore and Germany 3 October 1973	Nationals and companies lawfully constituted in accordance with its legislation of either party. Definition of company in respect of Germany is having seat in the territory of Germany and lawfully incorporated.	Only Investment made within the territory of either party. On Singapore side, investment must be approved in writing by the government of Singapore, and on German side, investment made in accordance with its legislation.	**Admission Pre-entry** in accordance with its legislation and administrative practice within the framework of the general economic policy **Treatment Post-entry** national treatment or at least MFN treatment where applicable	**Appropriation** for the public benefit **Compensation** just and equitable with fair market value, without delay, freely transferable	1. amicable settled by the both governments 2. arbitration	-Admission shall not be conditional for availing incentives for the purpose of investment promotion. -Companies shall not include a branch(es) which has its seat or constituted in a third state.
Singapore and Netherlands 16 May 1972	Nationals and legal persons controlled directly or indirectly by nationals of that	On Singapore side, only the approved investment in writing made within the	**Admission Pre-entry** fair and equitable treatment within the	**Appropriation** in the public interest and under due process of law non-	arbitration	including international merchant shipping services

	contracting party and constituted in accordance with the laws of the other contracting party.	territory of Singapore. On the Netherlands side, all investment made by nationals of Singapore in the territory of Netherlands	framework of their respective legislation **Treatment Post-entry** national treatment and MFN treatment whichever is more favourable	discrimination Compensation just **Compensation** without undue delay, transferable in the currency of the country of the nationals affected		
Singapore and Belgium-Luxembourg 17 November 1978	Nationals and legal persons legally constituted under the laws in force in either contracting party	Investment approved in writing by the contracting party in whose territory the investment have been made or will be made subject to the laws and to the condition upon which such approval shall be granted	**Admission Pre-entry** accorded fair and equitable treatment in the territory of either contracting party subject to its right to exercise powers conferred by its laws or its administrative practice within the framework of its general economic policy **Treatment Post-entry** MFN treatment	**Appropriation** for public purpose, non-discrimination **Compensation** prompt, adequate and effective payment of compensation, represent market value and free transferability	1. Amicably settled by the both parties 2. refer to ICSID	MFN treatment not extend to the regional arrangements for custom, trade tariff or monetary matters which each contracting party is or will be a member
Thailand and Germany 13 December 1961	Nationals and juristic persons of either contracting parties. the term juristic persons or companies mean entity having its seat in the territory of either party and lawfully existing consistent with legal provisions	only approved investment made in the territory of either contracting party in accordance with their legislation. Contracting party is free to decide in accordance to its policies and published plans	**Admission Pre-entry** admit the investment in accordance with the legislation and subject to approval process **Treatment Post-entry** national treatment and MFN treatment where applicable	**Appropriation** for the public benefit **Compensation** just compensation, freely transferable, without undue delay	1. settled by the both governments 2. arbitration	**Repatriation or transfer of benefit** Transfers from Thailand are subject to the regulation of the Bank of Thailand regarding stability and balance of payment, large amount of transfers shall be made in instalments
Thailand and Netherlands 6 June 1972	Nationals and legal persons constituted in accordance with the laws of either contracting party in the territory of that party including legal person which is controlled by a national of the other contracting	subject to their legislation, companies, associations, other organisations of any kind or subsidiary bodies connected with economic life and all other nationals engaged in economic activities in its	**Admission Pre-entry** in accordance with its laws and requirements to admit investment from the other contracting party **Treatment Post-entry** national treatment and	**Appropriation** for the public benefit and under due process of law, non-discrimination **Compensation** just compensation in accordance with international law, without undue delay, in currency of the	arbitration	territorial extension, on the Netherlands side, the agreement shall apply to the territory of the Kingdom in Europe, to Surinam and to the Netherlands Antilles

	party	territory	MFN **treatment** where applicable within the limit of laws or legislation	**affected nationals. In** case of transfer of large amount, it can be in instalments		

The ASEAN Agreement for the Promotion and Protection of Investments

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

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

4.6 Conclusion

In conclusion, it can be seen that ASEAN BITs and the ASEAN regional investment agreements are not different either in form or in principle, as regards the treatment of foreign investors, who are generally subject to domestic investment laws and regulations. This shows that ASEAN countries have maintained a very strong position in preserving their sovereignty in policy making and governing foreign investment to comply with their economic development plans, as well as strictly controlling their economic activities that are geared towards the economic master plans. In other words, governmental intervention has been very important in this region in terms of

investment concerns.

However, after the crisis took place in Asia in 1997, ASEAN launched many new framework Agreements including a framework agreement on the ASEAN Investment Area, which has dramatically changed ASEAN policy in restricting entry and establishment of foreign investment. How far the AIA has generalised investment liberalisation will be discussed in chapter 5.

Initially, the likelihood that ASEAN countries would accept the Multilateral Agreement on Investment, which had been negotiated in the OECD, was not strong. However, the negotiation of MAI in OECD was ended after it encountered a wave of anti-MAI opposition from developing countries, and also from NGOs from developed countries. However, MAI may proceed in WTO[128] in the millennium round instead. Even so, it seems difficulties lie ahead unless the substance of MAI is altered and developing countries take part in the negotiation process.

This raises the question of what is a new direction for ASEAN in economic development, especially in the regulation of investment, which has been the main engine propelling economic growth in ASEAN? Whether ASEAN will further liberalise trade and investment to establish an open door policy, or strengthen intra-ASEAN economic integration, which could mean preferential treatment among ASEAN members, is the main issue. However, to attract foreign investment is still the major policy of ASEAN. Therefore, the assurance of attractiveness of the investment environment in the region, legal, political, and economic stability and predictability, are essential, especially for foreign investors who require a high standard of investment regulations and protection. Since more than 70% of the inflow of FDI is from the OECD countries, they might use this leverage against ASEAN countries in

[128]. The EU and Japan have proposed bringing the investment issue under the umbrella of WTO.

making decisions on their investment regulations.

ASEAN countries now need to re-think their strategies in attracting foreign investment. The establishment of the ASEAN Investment Area has been regarded as a new policy option of ASEAN to move toward closer economic integration within the region and more liberalised investment intra-ASEAN. AIA would also encourage the inflow of foreign direct investment due to the economies of scale generated by the enlargement of the ASEAN market through regional economic integration and intra-ASEAN investment liberalisation. Crucially, this may lead to enhanced regional ASEAN investment laws and regulations. Harmonisation of ASEAN investment laws at a certain level will ensure the certainty and unity of the ASEAN investment regime and practices. Harmonious ASEAN investment laws may concertedly guarantee foreign investment protection against expropriation and award compensation based on international law. Moreover, harmonisation of investment laws may enhance the system of investment-related laws and regulations, such as regulations on foreign employment, labour standards, environmental protection, taxation, and competition rules. A favourable legal environment for foreign investment in ASEAN is an important determinant in the allocation of foreign investment in addition to a favourable economic environment.

Once ASEAN implements intra-regional trade and investment liberalisation, there is a necessity to ensure that fair competition among firms is firmly established, as deregulation and the elimination of previous restrictive laws would take place. This is to ensure that unfair competitive practices among private firms such as monopolisation, anti-competitive mergers & acquisitions, and restrictive business practices would not replace restrictive government laws and regulations. Therefore, the more liberal the ASEAN economy becomes, the greater the necessity to regulate

firms and enterprises that operate freely in the region under competition rules. The discussion of competition policy, laws and regulations will be in chapter 6. The next chapter will analyse the recently launched ASEAN framework agreements that aim to move towards deeper regional integration and intra-ASEAN liberalisation, which will help to promote generalised liberalisation based on "Open Regionalism".

Table 2
Summary of ASEAN countries' investment measures

	Indonesia	Malaysia	Philippines	Singapore	Thailand
Equity Restrictions	100% foreign equity permitted in some sectors. Maximum foreign equity of 49% for firms on local stock exchange	100% foreign equity permitted for firms that export minimum 80%	Majority equity permitted for firms not on negatives list	100% foreign equity permitted, except in mass media, public utilities, telecommunications, and domestic financial services	Foreign equity restrictions subject to Alien Business Law.
Local Content Requirements	For some sectors.	For some sectors.	For some sectors	None	For some sectors.
Transfer of Profits	No restriction	No restriction	No restriction	No Restriction	No Restriction
Employment Restrictions	Work passes issued liberally	Restricted, depending on local conditions	Restricted, depending on local conditions	Work passes issued liberally	Restricted, depending on local conditions
Entry Limits	Negative clause; certain sectors are closed	Negative clause; mass media closed	Negative clause; certain sectors closed	Negative clause	Negative clause; certain sectors closed
Tax Incentives	Tax deferrals, depreciation allowance.	Income tax holiday to 5 years; investment tax allowance; export, training, R&D, and sector incentives.	Investment tax credits; income tax holiday up to 6 years. Regional and employment incentives.	Income tax holiday for 5-10 years in approved enterprises.	Income tax holiday of 3-10 years depending on location.

Source: Compiled from National Laws and Regulations of ASEAN Countries

Chapter 5

A New Direction for ASEAN: Open Regionalism[1] and Deeper Integration

Introduction

Over the past three decades ASEAN has shown a reluctance to move towards deeper regional integration[2]. A lack of political will[3] is the main reason for this low-key implementation of regional institutions. Moreover, it has been said that the specific nature and culture of "the ASEAN way or ASEAN Style" in regionalisation is based on the indigenous political culture of the region, which it is claimed to have served ASEAN well.

The "ASEAN way" has its foundation in the "*Musyawarah*" practice, which has been generally used in Southeast Asia for centuries and it has been adapted to be "the ASEAN way" (Kemapunmanus,Lawan: 1985), at all levels, from the local, national, to international level, to conduct their relationship among themselves. Musyawarah is based on the "consensus" practice that all issues concerned would be discussed and debated until reaching a final resolution with mutual recognition. This no-vote system has long been implemented in ASEAN. This is regarded as a flexible method and it has been claimed that the Musyawarah practice has saved ASEAN from conflict and confrontation. Moreover, as ASEAN has played an important role in

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[1] . This chapter is originally analysed by the author especially on the issue of legal aspect of open regionalism: how ASEAN balances regional preferential treatments and the generalised liberalisation. Therefore, there are very few references to the bibliographical literature as the topic is very original and other literatures are not available. The author gratefully acknowledges Prof. Sol Picciotto for his profound stimulation of this thinking and analysis.

[2]. As ASEAN has no supranational institution, the highest decision-making body is the Heads of Government Meeting that provides policy, guidelines, supervision and decision leading to the ASEAN's direction. And it is the Heads of ASEAN Governments that always declare the political will of ASEAN that it would maintain the flexibility of "the ASEAN way".

[3]. Chng Meng Kng has pointed out that "the basic reason for this lack of progress was not (only) institutional inadequacy (or bad program) but a lack of political will". Chng Meng Kng, 1992: 134 and Pelkmans stated that ... "institutions can and should facilitate but they cannot replace political will" Pelkmans, 1992.

APEC, APEC has also been influenced by "the ASEAN Way" in its implementation of the Asia-Pacific Free Trade Area by setting up the scheme without legal-binding pattern but based on concerted unilateral liberalization and a "Gentlemen's Agreement"[4].

However, the circumstances have changed: the altered global economic and legal environment, the close interaction and interdependence of trade and investment, the move towards regional economic integration in Latin America and Africa, the political changes in Eastern Europe, the deepening and enlargement of the EU. Above all, the 1997-8 Asian crisis was a major turning point. Thus, The Statement on Bold Measures resulting from the ASEAN Heads of Investment Agencies Meeting on 24th July 1998 asserted that:

> "The financial crisis and economic crisis has severely affected the ASEAN economies and business dynamism in the region. In order to regain business confidence, enhance economic recovery and promote growth, the ASEAN Leaders are committed to the realisation of the ASEAN Free Trade Area (AFTA). In addition, the Leaders agreed on special incentives and privileges to attract foreign direct investment into the region. To enhance further economic integration of the region, the Leaders also agreed to further liberalize trade in services".

The AHIA also noted that "it is even more important now, in the light of the present financial crisis besetting the region, to strengthen regional co-operation in promoting greater direct investments into and within the region"[5]. All these circumstances emphasise the urgent need for policy changes in ASEAN countries.

There have been calls for strengthening regional co-operation. The Secretary-General of ASEAN on 30th April 1999, calling for regional integration in response to the Asian crisis and global economy, emphasized that:

> "One painful but invaluable lesson from the current economic difficulties is that in this age of globalisation, nations can thrive and flourish only if they band together for common purposes. Through internal reforms, active cooperation and purposeful integration, ASEAN will certainly overcome the difficulties, as it has already begun to do so. ASEAN will be stronger and ready for sustainable growth

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[4] . See the *Bogor Declaration on Asia-Pacific Trade Liberalisation.* APEC Leaders' Declaration Bogor, Indonesia, 15 November 1994 .

[5]. See Statement on Bold Measures in Annex 11.

> and development in the new millennium. With half a billion people in ASEAN and a combined GDP of nearly US$ 700 billion, ASEAN remains an important market and platform for production". (Statement by the Secretary-General of ASEAN welcoming the Kingdom of Cambodia as the Tenth Member State of ASEAN30 April 1999, ASEAN Secretariat)

ASEAN started strengthen its closer regional co-operation in the AFTA scheme that clearly signals ASEAN countries to move up to the level of regionalisation by launching Free Trade Area: free movement of intra-ASEAN trade by realising that:

> "tariff and non-tariff barriers are impediments to intra-ASEAN trade and investment flows, and that existing commitments to remove these trade barriers could be extremely improved upon". (Preamble of the Framework Agreement on Enhancing Economic Co-operation, Singapore, 28 January 1992)

Some plans[6] of ASEAN imply moves towards deepening regional integration[7]. Nevertheless, the links between individual ASEAN and non-ASEAN countries are still stronger than those regionally, and ASEAN is committed to the policy of "Open Regionalism".

ASEAN's direction and development are very much based on social, economic, and political factors and circumstances. This chapter will discuss legal aspects of ASEAN integration, i.e. deeper integration and "Open Regionalism"[8], by analysing the feasibility of closer ASEAN integration following the recent initiatives when ASEAN has launched important new framework agreements for this purpose. The discussion of these new framework agreements of ASEAN and their implications for regional

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[6]. The new framework agreements of ASEAN imply the moves towards deeper regionalisation of ASEAN such as to enhance free movement of service suppliers intra-ASEAN under the Framework Agreement on Services. Also the ASEAN investment area, when fully implemented, it facilitates the codification of ASEAN investment laws and regulations or at least the mutual recognition of laws or regulatory coordination in order to implement the AIA and facilitate intra-ASEAN investment. This process involves various aspects of laws such as taxation, investment laws, company law, and other related laws and regulations.

[7]. This is especially emphasised in The Hanoi Action Plan, which accelerated all new framework agreements of ASEAN to realise the objectives set forth in the agreements and clearly considered to enhance regional economic integration, which provided the action plan in section "II. ENHANCE GREATER ECONOMIC INTEGRATION: To create a stable, prosperous and highly competitive ASEAN Economic Region in which there is a free flow of goods, services and investments, a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities".

[8]. The concept of "open regionalism" as developed and applied in these new ASEAN arrangements has not yet been discussed or analysed by scholars, so this chapter is based largely on primary sources.

integration emphasises how far these agreements entail intra-ASEAN preferential treatment or more generalised liberalisation, and the balance between these.

5.1 The New Framework Agreements of ASEAN

Although ASEAN has been established for three decades, since 1968 (just ten years after the creation of the EEC), it has not yet reached any significant level of regional integration. It could hardly be claimed that the economic co-operation programs implemented in ASEAN were a full success. ASEAN remains just a loose regional grouping, with no supranational institutions to provide common policy, or to stipulate any laws and regulations governing ASEAN economic activities. Each member country still maintains its own independent law and policies, its legal system, and its sovereign right to control and regulate internal activities as well as conduct external relationships, except those mutually agreed in the economic, social and political co-operation programs. Every program implemented in ASEAN has been agreed among the member countries on a consensus basis.

It was only in 1992 that ASEAN began to develop the idea of establishing the ASEAN Free Trade Area, a scheme for strengthening intra-regional economic co-operation to respond to global change[9]. Resulting from the Fourth Summit Meeting, the Framework Agreement on enhancing economic co-operation, better known as the Framework Agreement on ASEAN Free Trade Area, was signed on 28th January 1992.

5.2 ASEAN Free Trade Area (AFTA)

The 1992 framework agreement of AFTA bound ASEAN states to the establishment of an ASEAN Free Trade Area initially within 15 years, beginning 1st January 1993.

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[9]. This was clearly stated in the preamble of the Framework Agreement on enhancing economic cooperation: "conscious of the rapid and pervasive changes in the international political and economic landscape, as well as both challenges and opportunities yielded thereof, which need more cohesive and effective performance of intra-ASEAN economic co-operation".

The implementation of AFTA was subsequently accelerated[10]. ASEAN recognises the close interdependence of trade and investment, and is aware that it can only attract inflows of trade and investment into the region by its sound economy. Therefore, to strengthen intra-ASEAN trade by accelerating the elimination of tariff and non-tariff barriers to trade within the region to gain economies of scale would also help to induce inflows of investment as well. It has been claimed that the AFTA scheme conforms to the GATT[11]. However, the practical legal issues of GATT compatibility of AFTA must be carefully considered, and will be further discussed below.

Under AFTA, the Common Effective Preferential Tariff (CEPT)[12] is the main instrument to encourage intra-ASEAN trade. The CEPT Agreement allows ASEAN member Countries to reduce their tariffs to 0-5% on a MFN basis among ASEAN members. Although this establishes a preferential arrangement within ASEAN, it may nevertheless be acceptable to other countries because of the benefits the larger regional market will create. So AFTA encourages not just intra-ASEAN trade but also trade and investment from other countries. From this point of view, AFTA can be regarded as "Open Regionalism", i.e. economic integration within the region while welcoming outsiders.

However, at the outset, the implementation of AFTA to ensure closer regional economic integration was still far from real. There were so many categories of

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[10]. See ASEAN Update vol.1/1999, 1st quarter of 1999. See also Statement on Bold Measures, the Heads of ASEAN countries agreed to accelerate the AFTA, the original six countries would advance the implementation of AFTA by one year from 2003 to 2002. They also agreed to achieve a minimum of 90% of their total tariff lines with tariffs of 0-5% by the year 2002, which would account for 90% of intra-ASEAN trade.

[11]. "AFTA is a GATT-consistent and an outward looking arrangement. No trade barriers are raised against non-ASEAN economies as a result of the formation of AFTA. Give the open structure of ASEAN economies, the expansion of production in an ASEAN regional market would enhance ASEAN's linkages with the world and generate greater opportunities for exporters outside the region". Press Statement, The Third AFTA Council Meeting, Indonesia, 11th December 1992.

[12]. Art. 1 of the Agreement on the Common Effective Preferential Tariff (CEPT) scheme for ASEAN Free Trade Area states that "CEPT" means the Common Effective Preferential Tariff, and it is an agreed effective tariff, preferential to ASEAN, to be applied to goods originating from ASEAN Member States, and which have been identified for inclusion in the CEPT Scheme in accordance with Arts. 2 (5) and 3.

products excluded from the list as an exclusive list. Agriculture has been regarded as sensitive and therefore been put aside. There were also protests from within the affected countries where products were included in the list for tariff reduction by the affected producers. For instance, the palm growers and palm oil industry in the South of Thailand and in Malaysia feared to lose their dominant market share, and their tariff protection to the free entry of product from neighboring countries once AFTA is fully implemented.

It was more like a special scheme for mutual economic co-operation than a general regional economic integration. Even though in 1994 ASEAN adopted the acceleration of the AFTA time frame, it was only at the 6th ASEAN Summit, in Hanoi in 1998, that the ASEAN leaders adopted measures to accelerate the region's economic integration and the completion of the AFTA even faster[13]. Initially only fifteen categories of products[14] identified in the AFTA Frame work Agreement to be included in the CEPT scheme[15] were subject to the fast track tariff reduction towards a nil tariff. The fast track is to reduce tariff rates above 20% to 0-5% by 1st January 2000, and to reduce tariff rates at or below 20% to 0-5% by 1st January 1998. The normal track is to reduce tariff rates above 20% to 20% by 1st January 1998 and subsequently from 20% to 0-5% by 1st January 2003, and to reduce tariff rates at or below 20% to 0-5% by 1st January 2000.

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[13]. See Statement on Bold Measures in Annex 11.

[14]. They are vegetable oils, cement, chemicals, pharmaceuticals, fertilizer, plastics, rubber products, leather products, pulp, textiles, ceramic and glass products, gems and jewelry, copper cathodes, electronics, and wooden and rattan furniture.

[15]. Agreement on the Common Preferential Tariff (CEPT) scheme for the ASEAN Free Trade Area (AFTA), ASEAN Documents series 1991-1992 (Notified to the GATT in L/7111). CEPT is the primary instrument for implementing AFTA. However, all products under the PTA (Preferential Trading Arrangement) which are not transferred to the CEPT Scheme shall continue to enjoy the MOP (Margin of Preference) existing as at 31st December 1992 (CEPT Agreement, Art. 2 (6). PTA was the initial agreement providing for economic cooperation in ASEAN. This agreement provides that the member states of the ASEAN are to extend trade preferences to each other in accordance with the provisions of the agreement and the rules, regulations and decisions agreed within its framework.

The time frame[16] for fully implementing AFTA has been set at 10 years for the more advanced economies of ASEAN[17] and 15 years for the new ASEAN members. However, in 1998 the ASEAN countries agreed to further enhance the realisation of AFTA and they agreed that each individual country would commit to achieve a minimum of 85% of the inclusion list with tariffs of 0-5% by the year 2000, and a minimum of 90% of the inclusion list in the 0-5% tariff range by the year 2001. By 2002, 100% of items in the inclusion list would have tariffs of 0-5%. They also agreed to implement, as soon as possible, tariff reductions to 0% and to accelerate the transfer of products which are currently not included in the tariff reduction scheme into the inclusion list. The new members of ASEAN also agreed to reduce their tariff lines between 0-5% by 2003 for Vietnam, and 2005 for Laos and Myanmar; to expand the number of tariff lines in the 0% category by 2006 for Vietnam, and by 2008 for Laos and Myanmar[18]. This shows the impact on ASEAN economic integration of the Asian crisis, as all these developments have taken place due to the action plan of ASEAN for recovery from the crisis.

In fact, ASEAN vigorously reviewed its institutional mechanism (Tan Sri et al, 1991; Chng Meng Khng, 1991) in the fourth ASEAN Summit, at the same time as launching the AFTA scheme, and many attempts had been made to streamline its institutional mechanism. However, at that time the development did not have the clear aim of deepening regional integration but rather of strengthening its function as it

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[16]. The time frame of 15 years for implementing AFTA specified in the original framework agreement adopted in 4th ASEAN Summit has been changed at the Meeting in September 1994. AFTA members agreed to implement AFTA over 10 years instead and to include unprocessed agricultural goods, which were originally excluded from the agreement. See "Ministers accelerate implement of AFTA", *ASEAN UPDATE,* October 1994, pp. 1-3.

[17]. Brunei, Indonesia, Malaysia, the Philippines, Singapore, and Thailand.

[18]. The Hanoi Plan of Action agreed upon on 15th December 1997. The acceleration of the time–frame of AFTA implementation was provided in Section II. 2.1 of the Action Plan.

should be in those circumstances. This reflects the lack of a political basis for supporting integration at the initial stage of AFTA[19].

In the past, the rationale for maintaining a loose organisation was that ASEAN countries did not have the political will[20] to enhance regional integration, to establish regional regulatory regimes and supranational institutions in ASEAN. Consequently, most of the co-operation programs were agreed in a loose framework-agreement form and they have been implemented individually rather than on a common policy basis. This includes the initial Framework Agreement on AFTA. But after the Asian crisis, we have seen various changes and accelerations take place to realise the ASEAN free trade area.

The main progress, even before the Asian crisis, for the improvement of AFTA was facilitated by two protocols: The Protocol to amend the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (1995) [21] and The Protocol to Amend the Agreement on ASEAN Preferential Trading Arrangement (1995)[22]. The first enlarges product coverage to include all manufactured products and processed agriculture products, which were previously excluded from the list[23], and also accelerates the time frame to fulfil AFTA by re-setting the schedule of tariff reduction in various sectors[24]. The latter amends the rule of origin by substituting the rule of origin under the agreement on ASEAN Preferential Trading Arrangement for the rule of origin under the Common Effective Preferential Tariff Scheme for

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[19]. Previously, the concept of a free trade area or custom union within the ASEAN was rejected and other methods of more limited economic co-operation were adopted such as the Preferential Trading Arrangement, ASEAN Industrial Projects, ASEAN Industrial Complementation, ASEAN Industrial Joint Ventures.

[20]. Pelkmans pointed out that "Initially, the word 'integration' is a taboo in ASEAN. It is only recently that ASEAN countries endeavour to implement regional integration". Pelkmans 1997: 216.

[21]. Done at Bangkok on 15th December 1995.

[22]. Done at Bangkok on 15th December 1995.

[23]. Art. 2 of the Protocol to amend the Agreement on the Common Effective Preferential Tariff Scheme for the AFTA (1995) provided that "This Agreement shall apply to all manufactured products including capital goods, and agricultural products".

AFTA[25]. Because the CEPT is the instrument for implementing AFTA and replaces the PTA[26], which is the instrument for preferential trading arrangement prior to the launch of AFTA and will be gradually eliminated and replaced by the CEPT under AFTA. Prior to the establishment of AFTA, the measures mostly adopted were the extension of tariff preferences. Under PTA, an effective ASEAN margin of tariff preferences was to be accorded on a product-by-product basis and where tariff preferences were to be negotiated on a multilateral or bilateral basis, the concessions so agreed would be extended to all parties on an ASEAN MFN basis, except where special treatment is accorded to products of ASEAN Industrial Projects. The main differences between the PTA and CEPT are that under the former, preferences are granted only by the nominating country and there is no reciprocity. Under the latter, there is reciprocity in that goods must be accepted to be under CEPT by all countries so that all must give the preferential tariff. CEPT is, therefore, potentially more encompassing (Davidson, 1997b: 83-95). This development implies a shift toward economic integration of ASEAN. Moreover, it reflects the conditions and factors affecting ASEAN development that fundamentally lie in political appetite and economic circumstances.

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[24]. Art. 3 of the Protocol to Amend the Agreement on the Common Effective Preferential Tariff Scheme for the AFTA (1995).

[25]. Art. 1 of the Protocol to Amend the Agreement on ASEAN Preferential Trading Arrangement (1995) provided that "Annex 1 of the Agreement on "Rules of Origin for the ASEAN Preferential Trading Arrangements", previously amended by the Protocol on Improvements on Extension of Tariff Preferences under the ASEAN Preferential Trading Arrangements signed in Manila on 15th December 1987, and the "Operational Certification Procedures for the Rules of Origin of the ASEAN Preferential Trading Arrangements" shall be substituted with the "Rules of Origin for the Common Effective Preferential Tariff (CEPT)" Scheme for the ASEAN Free Trade Area and the "Operational Certification Procedures for the Rules of Origin of the ASEAN Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area" set out in ANNEX 1 and ANNEX 2 respectively which shall form an integral part of this Protocol".

[26]. Agreement on ASEAN Preferential Trading Arrangement was signed on 24th February 1977 resulting from the resolution of the Declaration of ASEAN Concord. The Agreement provided that ASEAN members are to extend trade preferences to each other in accordance with the provisions of the agreement and the rules, regulations and decisions agreed within its framework. PTA is not aimed at creating custom union or free trade area within the meaning of Art. XXIV of GATT but rather to create a preferential trading area based on the exception of MFN obligation under the "enabling clause" agreed

Additionally, in the past, ASEAN neither sought to regionalise the financial system nor to strengthen intra-ASEAN capital flows, to facilitate economic flows within the region. There was no objective of facilitating the free movement of capital, one of the main production factors[27]. Only after AFTA was established was there a policy of implementing the free movement of capital provided in the aforementioned Framework Agreement for enhancing economic co-operation[28]. Only after the financial crisis took place in Asia, did ASEAN countries think about the launching of an ASEAN currency exchange and payment system for intra-ASEAN trade[29]. This policy would help promote regional currencies and enhance financial stability in the region, and also help cushion the negative impact of financial turmoil from outside the region. It will also facilitate and stimulate intra-ASEAN trade and investment by reducing risk from the loss caused by the fluctuation of currency exchange rates in world markets. All these new policies are dictated by current circumstances, which further influence political support from each member.

5.2.1 AFTA and the GATT/WTO

In legal terms the ASEAN Free Trade Area is a preferential trading arrangement[30]. AFTA was not established under the provision of Art. XXIV of GATT

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to by the Contracting Parties at the Tokyo Round of the GATT to allow developing countries to enjoy preferences extended to each other.

[27]. The principle of free movement of capital is included in the preamble and objectives of the Framework Agreement for enhancing economic co-operation, which facilitates and strengthens liberalisation of trade and investment in the region. ASEAN Free Trade Area is one of the objectives of this Framework Agreement.

[28]. Section C. 2 of the Framework Agreement provided that "2. Member States shall encourage and facilitate free movement of capital and other financial resources including further liberalization of the use of ASEAN currencies in trade and investments, taking into account their respective national laws, monetary controls and development objectives".

[29]. Paragraph 13 of the Hanoi Declaration of 1998, at the sixth ASEAN Summit Meeting, in Hanoi on 16th December 1998. The paragraph states that "We encourage wider use of ASEAN currencies in intra-ASEAN trade settlement". It has been emphasized in the Hanoi Plan of Action to introduce an ASEAN currency and exchange rate system. The Hanoi Plan of Action is the blueprint covering the first six years of the ASEAN Vision 2020 that the ASEAN leaders issued at the Meeting in Kuala Lumpur, Malaysia.

[30]. The Common Effective Preferential Treatment (CEPT) under AFTA is also preferential trading arrangement. However, the CEPT mainly differs from the initial PTA in its applicability that is on

[31]. Rather, AFTA was based on the permission given to developing countries to enter into preferential trading arrangements by the Tokyo Round "enabling clause"[32]. The Enabling Clause provides in its paragraph 1 that:

> "Notwithstanding the provisions of Art. I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties".

Paragraph 2 further clarifies that "The provisions of paragraph 1 apply to the following:

> "(c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with the criteria or conditions which may be prescribed by the Contracting Parties, for the mutual reduction or elimination of non-tariff measures, on products imported from one another".

ASEAN members have been regarded as developing countries so that they can accord among themselves differential and more favourable treatments, without according such treatment to other GATT/WTO contracting parties. This preferential treatment provision is different from the free trade area arrangement under Art. XXIV [33], under which the members of the free trade area are subject to the obligation not to apply higher duties or other regulations more restrictive to non-members than the ones applicable prior to the formation of the free trade area. Therefore, from its legal basis, currently AFTA is not obliged to conform to Art. XXIV of GATT. However,

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across the broad basis while the PTA was applied on a product-by-product basis and specified by agreed terms.

[31]. AFTA was not notified by ASEAN to GATT under Art. XXIV but the Agreement on ASEAN Preferential Trade Arrangements was notified under the Enabling Clause on 1st November 1977, examination concluded in 1979. Http://www.wto.org/develop/webrtasb.htm.

[32]. Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Decision of 28th November 1979 (L/4903), paras 1 and 2 (c). The Preferential Trading Arrangement was approved initially by the GATT CONTRACTING PARTIES in Decision of 29th January 1979 (L/4768): Agreement on ASEAN Preferential Trading Arrangements; notification under Enabling Clause in 1982 (L/5243). The protocol on Improvements on Extension of Tariff Preferences Under the ASEAN Preferential Trading Arrangements was approved by notification in 1989 (L/6569) See GATT (1995) *Guide to GATT Law and Practice.* 2 Volumes. Geneva: World Trade Organization.

[33]. Art. XXIV paragraph 5 (b) of GATT provided that "with respect to a free trade area, or an interim agreement leading to the formation of a free trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and

ASEAN's practice does raise questions concerning GATT/WTO compatibility, paradoxically because in practice AFTA does not create any higher barriers to trade from non-members but rather implements an open and outward-looking policy towards outsiders. Furthermore, the CEPT under AFTA encompasses all new ASEAN industrial co-operation schemes[34]. Under the AICO scheme, ASEAN could even grant favourable treatment to non-members[35] if they reached the requirements and conditions set forth under various schemes[36]; now its preferential arrangements were transferred to and encompassed by the CEPT for AFTA[37] in order to qualify for the available preferences, as AFTA covers all trade in manufactured products in ASEAN

> Art. 3 of AFTA provided that "This Agreement shall apply to all manufactured products, including capital goods, processed agricultural products, and those products failing outside the definition of agricultural products as set out in this Agreement.....".

Moreover, the ASEAN rules of origin also allow up to 60% of non-members' originating input incorporated in the ASEAN products entitled to the CEPT under AFTA. Rule 3 (ii) of the ASEAN Rule of Origin provides that:

> "(ii) Subject to Sub-paragraph (i) above, for the purpose of implementing the provisions of Rule 1 (b), products worked on and processed as a result of which the total value of the materials, parts or produce originating from non-ASEAN countries or of undetermined origin used does not exceed 60% of the FOB value of the product produced or obtained and the final process of the manufacture is performed within the territory of the exporting Member State".

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other regulations of commerce existing in the same constituent territories prior to the formation of the free trade area, or interim agreement, as the case may be".

[34]. The new form of ASEAN Industrial Co-operation (AICO scheme) will replace the BBC and AIJV schemes and shall be based on the CEPT under AFTA. The Basic Agreement for the ASEAN Industrial Cooperation Scheme was signed on 27th April 1996 in Singapore.

[35]. Although the national equity condition is imposed as a criterion; under the AICO Scheme, a national equity holding of one ASEAN member country in each of the participating company is sufficient. Since two companies are required to form an AICO Arrangement, each company must have its own national equity holding. For companies that cannot meet the equity condition, a waiver is possible if the proposing company meets other criteria imposed by the participating country in lieu of the 30% national equity.

[36]. Preferences granted under the ASEAN Preferential Trading Arrangements now transfer to the ASEAN Common Effective preferential Treatments under AFTA, and other preferences granted under AICO, AIJV, AIP, AIC also now come under the CEPT scheme for AFTA.

[37]. The AICO agreement stated that "The new ASEAN industrial cooperation scheme shall be based on the CEPT Scheme for AFTA".

Also ASEAN applies a cumulative ASEAN original input for CEPT products, so that in practice the 'net' cumulative regional content may be lower than the 40% and the eligibility for ASEAN-origin is still valid[38]. Hence, ASEAN is indirectly able to grant preferences to non-members in practice. ASEAN is able under AFTA to grant preferences to non-members including even developed countries, although under GATT such preferential treatment has to be accorded among member countries that are developing countries only. Although AFTA is legally based on the "Enabling Clause" but it practically complies with Art. XXIV.

Thus ASEAN practice raises questions about the compatibility of ASEAN schemes with GATT/WTO obligations since AFTA was notified under the "Enabling Clause". One is concerning the status as developing countries of some ASEAN members[39] and the other is the reverse grant[40] of preferences to GATT/WTO contracting parties. ASEAN should resort to Art. XXIV of GATT in the implementation of AFTA instead of the Enabling Clause, since in practice ASEAN has already implemented AFTA according to Art. XXIV of GATT rather than according to the "Enabling Clause". The implementation of AFTA under Art. XXIV may enable ASEAN countries to realise intra-ASEAN integration while they also integrate themselves into the world economy by implementing "Open Regionalism" or in the other words, to balance regional preferences with generalised liberalisation. An

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[38]. For instance, if product A has a value of 100, of which 40% is local content in Singapore, it may be exported to Malaysia at a CEPT rate, where 5% local content is added for a total value-added in Malaysia of 100. Upon export to Thailand it is considered to have 45% ASEAN content even though "net" cumulative content is 22.5% of 200. Example adapted from Pelkmans, 1997, p. 211.

[39]. Singapore has been regarded as more developed than the other ASEAN members and Singapore has been graduated from GSP due to the fact that its developing country status is untenable.

[40]. Davidson has pointed out that "The question becomes one of the role of a developed country participating in such scheme with developing countries. The enabling clause provides for the regional or global arrangements entered into among less developed contracting parties. Although the enabling clause also enables a developed country to give preferences to trade coming from developing countries, it does not permit the reverse, that the preferences to be given by developing countries to trade coming from developed countries. Moreover, such preferences have to be on a non-discriminatory basis in accordance with the Generalized System of Preferences". Thus it would appear that a developed country couldn't enter into a free trade area on the basis of the enabling clause. See Davidson, 1997b.

FTA under Art. XXIV needs to be compatible and consistent with the GATT principles that encourage global liberalisation. Therefore, regionalisation under Art. XXIV is complementary and interactive with generalised liberalisation. This is, in fact, the main aim of ASEAN's regionalisation, in balancing regional integration with the strengthening the integration of ASEAN economy into the global economy. This point leads to the consideration of the critical ASEAN policy changes, which would result in the strengthening of the ASEAN legal and institutional framework for the proper form and pattern of regionalisation in ASEAN. It is clear that ASEAN is committed to "Open Regionalism" because its economic interests lie outside the region. In fact the deepening and widening of ASEAN regionalisation is almost entirely inspired and promoted by the achievements of the WTO (Pelkmans, 1997: 230).

Most recently, the launching of the Framework Agreement on ASEAN Investment Area (AIA), the ASEAN Framework Agreement on Services (AFAS), and the Framework Agreement on Intellectual Property Rights aims to liberalise trade and investment in the region, and signal the crucial turning point of ASEAN to achieve closer economic co-operation that even goes beyond AFTA. I now turn to a discussion of these new agreements.

5.3 Framework Agreement on the ASEAN Investment Area (AIA)

5.3.1 Background and Nature of the Agreement

The Framework Agreement on the ASEAN Investment Area was signed on 8th October 1998 aiming at the establishment of "the ASEAN Investment Area". This was a result of the decision made in the fifth ASEAN Summit[41], which called for the establishment of a regional investment arrangement to enhance the attractiveness of the region for direct investment flows. The establishment of AIA also pursues the

[41]. The fifth ASEAN Summit was held in December 1995, in Bangkok, Thailand.

objective of the Framework Agreement on Enhancing ASEAN Economic Co-operation signed in Singapore on 28th January 1992[42].

The objective[43] of the Framework Agreement on AIA is to establish a competitive ASEAN Investment Area in order to "attract greater and sustainable levels of FDI into the region and to realise substantially increasing flows of FDI from both ASEAN and non-ASEAN sources by making ASEAN an attractive, competitive, open and liberal investment area"[44]. The agreement binds the member countries to "progressively reduce or eliminate investment regulations and conditions, which may impede investment flows and the operation of investment projects in ASEAN"[45] and to ensure the implementation of AIA within the agreed time frame. The agreement on AIA provided three pillars of broad-based programs for encouraging investment in the ASEAN region:

1) co-operation and facilitation;
2) promotion and awareness;
3) liberalisation[46].

5.3.2 The First Two Pillars: Co-operation and Facilitation, and Promotion and Awareness

The ASEAN Plan of Action on Co-operation and Promotion of Foreign Direct Investment and Intra-ASEAN Investment was initially endorsed at the fifth ASEAN Summit in Bangkok 1995 when the decision to establish AIA was adopted. It was further elaborated by the AHIA Meeting in July 1998. The plan of action contains various measures for investment facilitation and promotion. They include joint

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[42]. The preamble of Framework Agreement on AIA reaffirms the importance of sustaining economic growth and development in all member states through joint efforts in liberalizing trade and promoting intra-ASEAN trade an investment flows enshrined in the Framework Agreement on Enhancing ASEAN Economic Co-operation.
[43]. Art. 3: Objectives of the Framework Agreement on the ASEAN Investment Area.
[44]. Joint Press Release, Inaugural Meeting of the ASEAN Investment Area (AIA) Council, 8th October 1998, Manila, the Philippines.
[45]. Art. 3 (iv) of the Framework Agreement on the ASEAN Investment Area.

promotional seminars and activities to attract foreign direct investment; joint promotion to attract FDI in higher technological-based industries and high value-added activities; joint publications on investment regulations, policies, procedures and opportunities to further enhance the transparency of ASEAN's investment regime; simplification of ASEAN countries' investment procedures; joint training programs for ASEAN's investment officials on investment promotion; and closer co-operation among ASEAN investment agencies through exchange of investment data and information; and updates on any policy changes. ASEAN Investment co-operation work programs[47] will help to implement the ASEAN Plan of Action on Co-operation and Promotion of Foreign Direct Investment and intra-ASEAN Investment. Among these work programs are the linking of ASEAN member countries' homepages to the ASEANWEB; joint promotion events within and outside ASEAN, and human resource development. The Taskforce on the collection and reporting of FDI statistics was set up by the AHIA, to provide a comparable approach to measuring, collecting and reporting of FDI statistics for monitoring the progress and development of the ASEAN Investment Area. The Work Programs also include a compilation of measures taken and incentives provided by member countries in promoting FDI that will be published to assist the private sectors in their investment decision-making processes. In conjunction with the signing of the Framework Agreement on AIA and to facilitate FDI flows into the region, the AHIA agreed that three major projects be launched[48]:

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[46]. This results from the Meeting of the 4th ASEAN Heads of Investment Agencies, 24th July 1998, Singapore, Joint Press Statement. paragraph 6. They are incorporated in the Framework Agreement on AIA Art. 6 (1) (a), (b), (c).

[47]. This results from the Meeting of the Fourth ASEAN Heads of Investment Agencies, 24th July 1998, Singapore, Joint Press Statement. Paragraph 8.

[48]. Joint Press Statement, Meeting of the Fourth ASEAN Heads of Investment Agencies, 24th July 1998, Singapore.

1) ASEAN Supporting Industrial Database (ASID) for supporting industries for manufacturers and suppliers of ASEAN countries [49];

2) Directory of ASEAN-owned Technology Suppliers for facilitating intra-ASEAN sourcing of technology, enhancement of investment match-making, promotion of joint venture operations and to provide opportunities to technology suppliers in the region to supply technology to third countries;

3) Compendium on investment Policy and Measures of ASEAN countries for providing general information on investment policies and measures of the members.

The work programs include, among others, joint training programs, high level strategic planning meeting, a protocol to amend the ASEAN Agreement for the promotion and Protection of Investment[50], and a comprehensive survey on the promotion of FDI into and within ASEAN. Furthermore, it established the ASEANWEB, which links the websites among its member countries' investment networks, to provide investment information in order to enhance the transparency of ASEAN investment regime and for better access to investment information for investors. This helps investors gain access to the overall investment policies in ASEAN countries to facilitate their decision-making in investment. The AHIA convened a conference, where the ministers of ASEAN countries met up with world corporate leaders to encourage private sector companies to meet, interact, and to explore the opportunities present in the region[51]. It was also agreed that individual ASEAN countries should also consult the private sectors in their respective countries on what specific measures could be adopted to improve the investment climate. In this connection, they urged the private sectors to participate actively in these consultation[52].

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[49]. The ASEAN Supporting Industry Database will assist ASEAN investors seeking to source parts, components or raw materials from ASEAN rather than importing such products from outside the region, thereby enhancing ASEAN's industrial linkage.

[50]. The revised Protocol includes of provisions on transparency and predictability, the simplification of investment procedures and approval process, a dispute settlement mechanism, and accession of new members. The agreement is aimed at increasing the confidence of investors to invest in the ASEAN region.

[51]. Decision made by the ASEAN Heads of Investment Agencies Meeting, Manila, Philippines, 3rd-4th July 1997. The conference took place in conjunction with the 30th ASEAN Anniversary in 1998.

[52]. This resulted from the Meeting of the forth ASEAN Heads of Investment Agencies, 24th July 1998, Singapore.

5.3.3 The Third Pillar: the Liberalisation Program

Under the AIA, ASEAN agreed to promote itself as "***a single investment region***"[53] through joint investment promotion efforts, aiming at the full realisation of the ASEAN Investment Area. Under AIA, national treatment will be applied to both ASEAN investors and all other investors. ASEAN member countries hope that this will increase the confidence of investors in investing in the ASEAN region. The financial crisis[54] provided a further impetus for the move to liberalise the investment regime in the form of "bold measures".

The Sixth ASEAN Summit agreed to launch "Bold Measures" for speedy recovery from the crisis. Statement on Bold Measures paragraph 1. provided that

> "1. The financial and economic crisis has severely affected the ASEAN economies and business dynamism in the region. In order to regain business confidence, enhance economic recovery and promote growth, the ASEAN Leaders are committed to the realization of the ASEAN Free Trade Area (AFTA). In addition, the Leaders agreed on special incentives and privileges to attract foreign direct investment into the region. To enhance further economic integration of the region, the Leaders also agreed to further liberalize trade in services". The special incentives and privileges are provided in the "Short Term Measures to enhance ASEAN Investment Climate".

These include the "Short Term Measures to enhance ASEAN Investment Climate" that accelerates the implementation of AIA[55]. The short term practical measures cover the following areas[56]: minimum three years corporate income tax exemption or a

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[53]. Joint Press Statement of the ASEAN Heads of Investment Agencies Meeting, Manila, Philippines, 3rd-4th July 1997, Paragraph 7.

[54]. The Heads of Investment Agencies have noted that foreign direct investment and intra-ASEAN investment flows have declined dramatically since the beginning of the crisis. In this regard, they agreed that there is a need to take collective actions and measures in addition to those taken in the individual member countries. They called on the various private sector organizations in ASEAN to provide suggestions on meaningful, immediate and specific measures that will help in the economic recovery process. See Joint Press Statement of the Meeting of the Fourth ASEAN Heads of Investment Agencies, 24th July 1998, Singapore, Paragraph 3.

[55]. These "short-term measures" are applicable to all applications received from 1st January 1999 to 31st December 2000, and those approved thereafter. Each ASEAN country has agreed to extend additional special privileges to qualified ASEAN and non-ASEAN investors in the manufacturing sector. The "Short Term Measures" were agreed as part of "the ASEAN Investment Bold Measures" agreed upon by the ASEAN Leaders at the Sixth ASEAN Summit in Hanoi on 16th December 1998.

[56]. Section 1: Privilege Granted to new Investments/Projects or Expansion of Existing Investment Operations of the "Short-term Measures to Enhance ASEAN Investment Climate", Annex to the

minimum 30% corporate investment tax allowance; 100% foreign equity ownership; duty-free imports of capital goods; domestic market access; minimum industrial and leasehold period of 30 years; employment of foreign personnel; and speedy customs clearance. All these measures are applicable to all investors[57].

The specific measures and privileges extended by ASEAN member countries provided in section 3 of the Short Term Measures are as follows:

- Brunei will allow 100% foreign equity ownership in high-technology manufacturing and export-oriented industries.
- Indonesia offers wholesale and retail trade up to 100% foreign equity ownership to qualified investors, in addition to 100% foreign equity in all areas of the manufacturing sector. Indonesia has also reduced the processing time for approval in principle, for investment less than US$ 100 million, to 10 working days. In the banking sector, listed banks are open for 100% foreign equity ownership;
- Laos allows duty exemption on imported capital goods required by the promoted investment projects;
- Malaysia offers 100% foreign equity ownership in the manufacturing sector with no export conditions imposed on all new investments, expansions and diversifications, except for seven specific activities and products. Foreigners can also own land in Malaysia subject to certain limitations;
- Myanmar will extend a minimum of three years corporate tax exemption to all investment projects in all sectors. In addition, they will also extend the duty free import of raw materials to all industrial investments for the first three years of operation;
- The Philippines will open retail trade and distribution business to foreign equity. In addition, the Philippines has opened private construction in the domestic market to foreign companies;
- Singapore has substantially reduced business costs as part of a cost reduction package that amounts to S$ 10 billion in saving in addition to extending 30% corporate investment tax allowance on a liberal basis to industrial projects and to selected service industries in respect of productive equipment. These activities include manufacturing, engineering or technical services and computer-related services;
- Thailand allows 100% foreign equity ownership for manufacturing projects regardless of location. Furthermore, agricultural projects, which export 80% of sales, will receive import duty exemption on machinery, regardless of location;
- Vietnam extends duty exemption on imported capital goods for all projects in respect of the import of raw materials for production for especially encouraged investments and for projects located in mountainous or remote regions for the first 5 years of operation. The issuance of investment licenses for several types of projects has been reduced to 15 days

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Statement on Bold Measures, agreed upon by the ASEAN Leaders at the Sixth ASEAN Summit in Hanoi, in December 1998.

[57]. Joint Press Statement, First Meeting of the ASEAN Investment Area (AIA) Council, 5th March 1999, Phuket, Thailand. The statement declared that "all ASEAN countries are implementing the "bold measures" agreed upon by the ASEAN Leaders at the Sixth ASEAN Summit in Hanoi in December 1998. The privileges cover manufacturing investment applications received and approved by the respective ASEAN investment agencies in 1999 and 2000. The privileges under the "bold measures" are to be extended to all investors, ASEAN and non-ASEAN. The Council encouraged investors to take full advantage of the investment privileges offered under the bold measures during the promotion period.

> from the receipt of proper simplified documents. In addition, investment licensing for projects under US$ 5 million has been decentralised to all provinces and cities.

However, all privileges granted by ASEAN countries are subject to specific conditions: investors must meet the minimum investment level specified by the host country, if any; the industry must be in the published priority list for tax incentives to enjoy this particular privilege; the industry must not be in any negative list, if any; and the investor must show proof that foreign funds have been brought in for the entire amount of the investment, if required by the host country[58].

However, the AIA goes much further than these short term measures. It binds the member countries to eliminate investment barriers, liberalise investment rules and policies, grant national treatment and open up industries, initially in the manufacturing sector and later to cover other sectors under the agreement. Under the Framework Agreement on the AIA, national treatment will be made fully available within six months after the date of signing (7th October 1998) of the Agreement for ASEAN investors[59] in the manufacturing sector, subject to certain exclusions[60]. Initially, Art. 4 of the AIA agreement provided that national treatment is extended to ASEAN investors by 2010 but the "Bold Measures" agreed upon by the ASEAN Leaders at the sixth ASEAN Summit in December 1998 accelerated the time frame from 2010 to within 6 months after the date of signing the agreement or the date the agreement enters into force. Art. 21 of the Framework Agreement on AIA provided that "This

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[58]. Section 4: "Conditions" of the Short Term Measures to Enhance ASEAN Investment Climate.

[59]. In defining an ASEAN investor, a liberal definition has been adopted: an ASEAN investor is defined as equal to a national investor in accordance with the equity condition requirement of the respective host member countries.

[60]. The Council tasked the Coordinating Committee on Investment (CCI) to begin work on AIA, especially on the submission of the Temporary Exclusion List and Sensitive List for opening up of sectors for investment and the granting of National Treatment. The initial package of TEL and SL were be submitted within six months after the signing of the AIA Agreement for opening up investment in manufacturing sector for ASEAN investors. The other sectors would be gradually open and all industries would be opened by the year 2003 for ASEAN investors and by the year 2010 for all investors. Therefore, even though AIA provided for the opening up of all industries for investment to ASEAN investors by 2003 (initially 2010) and to all investors by 2010 (initially 2020), they are subject to the Temporary Exclusion Lists (TEL) and Sensitive List (SL).

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. This means national treatment extended to ASEAN investors is fully implemented immediately when the agreement enters into force, but subject to the exception provided for under the agreement.

The exclusions will be progressively phased out[61] by the six ASEAN countries [62] by the year 2003 instead of waiting for 2010[63] as initially agreed. Myanmar will also join the six ASEAN countries to fully implement the obligation in 2003 instead of the year 2015. Vietnam and Laos will exert their best efforts to achieve the early realisation of AIA in 2010 instead of 2013 and 2015 respectively. The AIA aims to promote the freer flow of capital, skilled labour and professionals, and technology among the member countries.

In relation to the AICO Scheme, ASEAN countries agreed to waive the 30% national equity requirement under the AICO Scheme during the period 1999-2000 to respond to the AIA short term measures. Moreover, the AIA arrangement affirmed their commitment to the 1987 ASEAN Agreement for the Promotion and Protection of Investment and its 1996 Protocol to enhance investor confidence in investing in ASEAN. The AIA also facilitates the implementation of the ASEAN Free Trade Area towards the ultimate goal of sustaining economic growth and development in all members, which would be a crucial turning point for ASEAN.

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[61]. The implementation of the Framework Agreement will be reviewed every two years to ensure that the objectives of the AIA are met.
[62]. Brunei, Indonesia, Malaysia, Philippines, Singapore, and Thailand.
[63]. Art. 4 (a) of the Framework Agreement on AIA.

The AIA is a step forward to a higher level of regional integration. However, since ASEAN member countries are members of GATT/WTO, it poses the question about its generalised liberalisation commitment to other countries, or in other words how ASEAN balances its intra-regional integration with global liberalisation. In AIA, the investment liberalisation scheme combines the strengthening of regional integration by intra-ASEAN investment liberalisation with generalised liberalisation by gradually opening up ASEAN investment to all investors. This will be discussed in the next section, which focuses on the legal aspects of the AIA Agreement and its implementation.

5.3.4 Legal Aspects of the AIA Agreement and its Implications

Provisions under the AIA, especially the extension of national treatment[64] and opening up of industries, greatly modify the previous constraints on foreign investors relating to these significant issues: restricted areas of investment, restricted entry and establishment, restricted foreign shareholding/equity, and other screening processes as well as controls on the operation of foreign investors[65]. These are the techniques employed by ASEAN countries in restricting the entry and establishment of foreign investors, or the screening of foreign investors into their territories (discussed in chapter 4 above). The Framework Agreement on AIA mainly focuses on liberalising such constraints to assure the 'open door' policy of ASEAN to a greater extent than ever before. Therefore, the decision to establish the ASEAN investment area as a single investment area that needs to eliminate all such barriers and constraints to investors, regardless of nationality and sources of investment, is a radical move toward investment liberalisation and closer economic integration in the region. Consequently,

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[64] . See UNCTAD (1999c) *National Treatment: UNCTAD Series on issues in International Investment Agreements.* New York and Geneva: United Nations Publication.

[65]. For detailed analysis on control of inward investment by host states, see Muchlinski, 1995: chapter 6, pp. 172-203.

national treatment[66] will be granted concurrent with the opening up of industries[67] to dismantle the main barriers to foreign investment in ASEAN countries. Even though the timetable for implementation of NT provides a 10-year differential between ASEAN investors and non-ASEAN investors, it is set as a transitional period for ASEAN countries to prepare their readiness for fully opening up the door, shifting to another level of liberalisation.

From a legal point of view, this move shows that ASEAN countries concertedly restrain their discretion and refrain from fully exercising their sovereign rights to control and screen foreign investment that previously were jealously guarded by all ASEAN countries. States, especially developing countries, have traditionally preserved their absolute rights, recognised in international law, to control the entry and establishment of foreign investors within their territory (Muchlinski, 1995: chapter 6; UNCTAD, 1999: 3). This policy change in ASEAN reflects the balance of interest generated by economic integration and the surrender of economic sovereign rights of the ASEAN member countries. This is the price to be paid for encouraging intra-regional economic development by liberalising investment. This further implies that the policy options and choice of the regulatory regime of ASEAN are centrally based on balancing the interdependence of the regional and global economic environment. However, the extent to which the AIA would fruitfully enhance intra-ASEAN preferential treatment by implementing the mutual National and Most-Favoured-Nation treatment among them, the extent to which AIA is generalised liberalisation, and what the balance is between them, will be analysed below.

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[66]. Art.4 (b) of the Framework Agreement on ASEAN investment Area.

5.3.5 Theoretical Models and Policy Options for Investment Liberalisation

The Framework Agreement on the AIA indicates that ASEAN countries are moving toward closer economic integration. This may be usefully analysed using the framework suggested by the UNCTAD, which proposes that investment regulations used among host states concerning entry and establishment of foreign investment may be categorised into five models[68]:

1) investment control model;
2) selective liberalisation model;
3) regional industrialisation program model;
4) mutual national treatment model;
5) combined national treatment/most-favoured-nation treatment model.

I will briefly discuss theses five models that countries generally choose to apply to their investment regime or investment agreement/arrangement together with their economic policy options. The actual provisions in particular agreements may involve a combination of characteristics and may be formed as a hybrid.

1) Investment control model is a model which the country preserves full state control over entry and establishment. This model is followed in most BITs, except the US and Canada BITs[69]. BITs recognise the restrictions and controls on the entry and establishment of FDI that leave the matter to national discretion. This approach is also favoured by certain regional instruments[70]. This model suggests a policy option that accepts complete state discretion through investment controls that preserve the general power to screen proposed investment.

2) Selective liberalisation model offers limited rights of entry and establishment, i.e. only in industries that are included in the positive list by the agreement of the

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[67]. Art. 7: Opening up of Industries and National Treatment, Framework Agreement on the ASEAN Investment Area.

[68]. For a detailed analysis on country approaches to entry and establishment, policy options and the five models see UNCTAD, 1999.

[69] . The US and Canada model BIT stipulate NT and MFN, whichever is the more favourable to foreign investors from the contracting parties.

contracting parties[71]. Rights of entry and establishment may be enjoyed but may be subject to restrictions that the host country is permitted by the agreement. Moreover, the contracting parties may make commitments to undertake further negotiations over liberalisation in specific industries at an agreed future date. This model suggest the policy option to liberalise cautiously through the adoption of a selective basis by opening up one or more industries at a time.

3) Regional industrialisation program model offers full rights of entry and establishment based on national treatment for investors from the members of a regional economic integration organisation only. This model encourages cross-border investment by way of regionally integrated enterprises and projects[72]. This model suggests the policy option to follow the regional industrial programme and the establishment of regional multinational enterprises therefore setting up a supranational form of business organisation aimed at encouraging intraregional economic development.

4) Mutual national treatment model offers full rights of entry and establishment based on national treatment for all natural and juridical persons engaged in cross-border business activities from member countries of a regional economic integration organisation. This model establishes a common regime for entry and admission for

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[70] . For example the ASEAN Agreement for the Promotion and Protection of Investment (see discussion in chapter 4), the Framework of the Southern Common Market (MERCOSUR), and the Agreement on Andean Subregional Integration (ANCOM) [see UNCTAD (1999a: 18-9)].

[71] . For example the General Agreement on Trade in Services (GATS) which is the "bottom up" approach liberalisation. The Contracting parties liberalise their service sectors only in the committed Country Schedule or Specific Sector Schedule, and they also can have limitation either on market access or NT treatment or both. See UNCTAD (1999a: 20).

[72] . ASEAN also uses this approach for intraregional investors in the Revised Basic Agreement on ASEAN Industrial Joint Ventures of 1987, the ASEAN Industrial Co-operation Scheme (AICO). Other agreements have followed this model are the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA) 9see UNCTAD (1996c) Vol III, p. 103., and the Revised Treaty of the Economic Community of West African States (ECOWAS) [see UNCTAD (1999a: 21].

investors from member countries[73]. MFN treatment for investors from non-members is generally not available. This model is different from the previous one, in that a right of entry and establishment is not limited to only a particular industrial programme. This model suggest the policy option to grant full liberalisation of entry and establishment on the basis of mutual national treatment allowing such a right to exist between states aimed at encouraging common interest in regional integration.

5) Combined national treatment/most-favoured-nation treatment model offers full rights of entry and establishment (pre- and post –entry) based on the better of NT or MFN, subject only to reserved "negative lists" of industries to which such rights do not apply. The US and Canada BITs also follow this model. The aim of this model is to widen the entry and establishment rights as far as possible to enable investors from member countries to obtain the same rights of access as the investors from national or third countries. In this model, MFN treatment is not available to investors from non-members. This model suggests the policy option to follow the full NT/MFN model and open up entry and establishment for investors from the contracting countries on the basis of the better of these two standards, subject only to "negative lists" of reserved industries[74]. The existence of negative lists of excepted industries emphasises that certain strategic industries may be beyond the reach of liberalisation measures.

Considered from this perspective, the AIA applies a hybrid model combining model 4's "mutual national treatment" and model 5's "combined NT/MFN treatment

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[73] . The most significant example of this model are the Treaty Establishing the European Community (EC), also the Code of Liberalisation of Capital Movements and the Code of the Liberalisation of Current Invisible Operations of the OECD. Several regional organisations also adopted this model such as the Treaty Establishing the Caribbean Community (CARICOM), the Treaty for the Establishment of the Economic Community of Central African States (ECCAS). Also the AIA of ASEAN which combines this model with the combined NT/MFE model. See UNCTAD (1999a: 22-25, 1996c:44-5).

[74] . The most significant example of this model is the NAFTA agreement, the 1994 Treaty of Free Trade between Colombia, Mexico and Venezuela, the MERCOSUR agreement, and the Asia-Pacific Economic Co-operation (APEC) Non-Binding Investment Principle. See UNCTAD (1996c Vol. III:73-77, Vol. II pp. 513,520, 536).

with negative lists". This is because AIA extend NT to all investors, not only investor from member countries, (immediately to ASEAN investor and to non-ASEAN by 2020) subject only to negative lists (Art. 4 (b), 7). Moreover, all industries are opened for investment to ASEAN investors by 2002 (initially by 2010), and to all investors by 2020 (Art.4 (c), 7). MFN is not, in principle, extended to non-ASEAN firms (Art. 8 and 9) unless they meet the criterion of "ASEAN Investor" (discussed below). Furthermore mutual NT is extended to ASEAN investors [Art.7(2)]. I will analyse this legal aspect of AIA and its applicable models in the following sections.

5.3.6 The Opening up of Investment under AIA

In the AIA for the first time ASEAN grants National Treatment to both ASEAN investors and all other investors[75]. However, ASEAN investors will be granted both NT and MFN treatment (under Arts. 7 and 8), while MFN treatment will not be extended to non-ASEAN investors. Because even though ASEAN has impiemented the "Open Regionalism", AIA is still a regional integration agreement. Therefore, in principle, it confines the preferences provided under AIA only to member countries, as this can waive the MFN treatment on the ground of Art. XXIV of GATT. Thus MFN will not be extended to non-ASEAN investors, except such investors meet the criterion to be regarded as an "ASEAN Investor", as such non-ASEAN investors can be entitled to all preferences provided under AIA. And this is the main thrust of the "Open Regionalism" where both regionalisation and generalised liberalisation are reinforced and balanced. (In other words, if MFN treatment is generally and unconditionally granted to non-ASEAN investors, AIA is not a regional integration arrangement but it is just a general investment liberalisation, part of globalisation).

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[75]. Art. 4 (b) of the Framework Agreement on the ASEAN Investment Area provided that "national treatment is extended to ASEAN investors by 2010, and to all investors by 2020, subject to the exceptions provided for under this Agreement;". However, the ASEAN Leaders agreed to accelerate the time frame: See Bold Measures. Section 6.1.3.3 above.

AIA attempts a combination of model 4 and 5 (discussed above) by extending NT and MFN to ASEAN investors first and then extending NT to non-ASEAN investors by the year 2020. However, MFN is only extended to the ASEAN-based investor (meeting the criterion of "ASEAN Investor") not to non-ASEAN investor directly. Thus a transitional phase approach is used from one model to another[76]. Moreover, the implementation of NT is subject to a 10-year differential between ASEAN investors and non-ASEAN investors. Therefore, it is clear that ASEAN investors are given priority. All industries [subject to the temporary exclusion list (TEL) and the sensitive list (SL)] are to be opened for investment to ASEAN investors immediately, and to non-ASEAN investors, although not until the year 2010[77]. However, NT/MFN treatment and opening up all industries for investment are also subject to the exceptions in the TEL and SL[78], as well as other exceptions under Art. 13 (General Exceptions), Art. 14 (Emergency Safeguard Measures), and Art. 15 (Measures to Safeguard the Balance of Payments).

The removal of restrictions or control on foreign investment is done by extending national treatment to the admission, establishment, acquisition, expansion, management, operation, and disposition of investment (AIA Art. 7(1)(b)). Previously, such regulations on screening and restricting entry and establishment were extensive in the ASEAN investment regime (see chapter 4). Under AIA, the ASEAN countries committed themselves to "progressively reduce or eliminate investment regulations

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[76] See UNCTAD (1999: 43).

[77]. Art. 4 (c) of The Framework Agreement on AIA provided that "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;" The time frame for opening industries for investment to ASEAN investors was accelerated from 2010 to 2003. See Bold Measures above.

[78]. Art. 7 (2) of the Framework Agreement on AIA provided that "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".

and conditions, which may impede investment flows and the operation of investment projects in ASEAN"[79] and not to create any new restrictions. Restrictions, which still remain, under the TEL and SL, are also subject to the stand still and roll back principles[80]. With the commitment to the stand still and roll back principles, ASEAN countries bind themselves not to create new restrictions, and to progressively eliminate existing regulations that impede investment flows or restrict foreign investment.

The combined NT/MFN treatment model with a negative list of exceptions implemented under AIA still allows ASEAN countries to maintain negative lists, which may be provided under their existing legislation. Even though ASEAN countries have deregulated and eliminated much of their investment controls, they still reserve some crucial strategic industries, indigenous and cultural industries, mostly for national security, health, public, cultural and safety reasons. This approach recognises that certain areas may be beyond the scope of liberalisation. However, ASEAN countries have to submit their TEL and SL to the AIA Council within 6 months after the date of signing the agreement and the TEL shall be reviewed every 2 years and progressively phased out by the year 2003[81]. Therefore, most industries reserved on TEL will be opened by the year 2003 and the SL will be reviewed by 1st January 2003. The AIA Council may decide a further review of the SL so that all negative lists might be lifted.

In addition, the Short-Term Measures to Enhance the ASEAN Investment Climate[82] also provided special privileges and measures for accelerating investment

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[79]. Art. 3 of the Framework Agreement.

[80]. For instance, the TEL and SL that need to be gradually eliminated and phased out are mostly the restricted industries previously closed to foreign investors.

[81]. Initially the time frame for phasing out the TEL was set in the year 2010 but was later accelerated to the year 2003. Section 8 of the Statement on Bold Measures.
See http://www.asean.or.id/economic/invest/sum_bold.htm.

[82]. Section 33 of the Hanoi Declaration provided that "As a step to enhance ASEAN's investment and trade environment, a package of bold measures and privileges will be granted to traders and investors. In this regard, we ask our Ministers to commence implementation of the package of bold measures

liberalisation (discussed above). This includes a suspension of laws regulating equity joint ventures between foreign and local enterprises and 100% foreign equity is now allowed[83]. Laws restricting foreign shareholders in national companies are also deregulated[84]. However, since the 100% foreign equity and other special privileges granted in the short-term measures are not set as permanent measures, they are subject to change and may alter in the future or be extended depending on later circumstances.

Consider in relation to the models suggested by UNCTAD (discussed in 5.3.5 above), the AIA agreement may be considered to be a hybrid model, as it binds ASEAN member countries to grant mutual national treatment to ASEAN investors and then to extend NT to non-ASEAN investors later, by the year 2010. Mutual national treatment involves a greater commitment to full liberalisation among member states aiming at attaining regional integration, in order to offer a larger geographical area within which globally competitive industries can be established. Under mutual national treatment, the right of entry and establishment are offered to investors located in member states that either possess the nationality of such state and/or are resident for business purpose in a member state. The aim is to establish a common regime for entry and admission for investors from member states (UNCTAD, 1999: 17). ASEAN countries also extend the combined NT/MFN treatment to ASEAN investors. This means ASEAN countries commit to offer each other NT and MFN treatment, whichever is more favourable to investors from any member country, at pre-entry and

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starting from 1st January 1999". The Statement on Bold Measures, which provides several measures accelerating trade and investment liberalization further provides details of Short-Term Measures To Enhance ASEAN Investment Climate. The Hanoi Declaration was done on 16th December 1998 at Hanoi, Vietnam. On the same day, the Statement on Bold Measures and the Short-Term Measures to Enhance ASEAN Investment Climate were adopted.

[83]. Section 6 (ii) Short Term Measures to Enhance ASEAN Investment Climate.

[84]. This can be seen from the privatisation schemes implemented in ASEAN countries, especially after the crisis, under the supervision and requirement of IMF that come along with the IMF help package. For instance, Thailand has to implement privatisation in various national companies, such as the Petroleum company, electricity enterprises (Electricity Generation Authority of Thailand: EGAT), and Telecommunication Authority of Thailand. Government allows foreign investors to hold shares in those

post-entry stages of investment. The aim is to widen entry and establishment rights as far as possible, to enable investors from other ASEAN countries to obtain the same rights of access as the national or most-favoured third country investor. Under AIA (Art. 8) "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 Member States". Therefore, any advantages accorded to third parties, either under existing or future agreements will be extended to all ASEAN countries. However, any ASEAN country can confer special treatment or advantages to adjacent countries under growth triangles and other sub-regional arrangements between member states[85], which need not be extended to others under the MFN requirement.

Consequently, implementation of AIA based on mutual NT and combined NT/MFN treatment is enhancing intra-ASEAN liberalisation or regional integration while it encourages the inflow of foreign investment from outside the region. Therefore, a combined model is implemented in AIA: NT/MFN treatment is initially granted to ASEAN investors until the transitional period elapses, then NT is granted to non-ASEAN investors. This reflects the transitional approach in investment liberalisation of ASEAN, firstly prioritising intra-regional investment liberalisation, and later closer integration with the world.

5.3.6 ASEAN Investor

Central to this model is the definition of "ASEAN investor". The status of ASEAN investor enables such an investor to be entitled to immediate NT/MFN treatment. Under AIA Art.1, an ASEAN investor is defined as:

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companies and also allows foreign investors to make takeover bids for the collapsed financial firms that had been taken over by the government after the crisis.

1) a national of a Member State; or

2) 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 fulfils 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 holding by nationals or juridical persons of ASEAN Member States in that investment.....
>
> "juridical person" means any legal entity duly constituted or otherwise organised under the applicable law of a Member State,.....
>
> "national" means a natural person having the citizenship of a Member State in accordance with its applicable laws.

Therefore under AIA, a national or any juridical person of a member state who invests in any ASEAN country is regarded as an ASEAN investor. Since Art.1 refers to a juridical person constituted in a member country, it is not limited to locally-owned entities. Thus, it does not exclude non-ASEAN investors who have formed a company in a member country, and they may be entitled to "ASEAN investor" status, provided it also meets the conditions for "effective ASEAN equity" on a cumulative basis. If Art.1 intended to exclude foreign-owned companies from the meaning of "juridical person of a member state", it should be clearly defined as "an ASEAN national juridical person", just like definitions in national investment laws which make a distinction between foreign-owned companies and national companies[86]. Accordingly, this definition of "ASEAN investor" enables any company legally formed in any

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[85]. Art. 8 (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".

[86]. For instance, Malaysian law defines a company as a foreign company or non-resident company where 50% or more of its paid up capital is held by non-residents; or it is branch of a company which is incorporated outside Malaysia; or the majority shareholding is held by residents but the ultimate right of control is held by non-residents. Under Thai Law, foreign company means a juristic person of which half or more of the capital is owned by aliens; a juristic person of which half or more of the shareholders, partners or members are aliens, irrespective of the amount invested by such aliens; a limited partnership or registered ordinary partnership of which its managing partner or manager is an alien. Under Indonesian law, investment where foreign investor is directly bears the risk of the investment is foreign investment. Also under the Philippines law, if a company or juristic person that

ASEAN country to be regarded as an ASEAN investor and entitled to NT/MFN treatment under AIA. For instance, a foreign-owned company duly constituted in Singapore may be entitled to the status of ASEAN investor and hence to benefit from both NT and MFN treatment. Consequently, the AIA provisions also indirectly encourage individual ASEAN countries to lower their national equity requirement or to eliminate discrimination between national and foreign investors at national level.

However, it needs to be made clear here that national equity requirements are also relevant to the existing national negative list, as a foreign-owned company (classified by its foreign-owned equity) cannot access certain industries that are closed to foreigners. Thus foreign-owned companies are still subject to the negative lists of each ASEAN country that are still allowed under AIA.

Nevertheless, for an ASEAN juridical person to be entitled to NT as an "ASEAN investor" it must also meet the requirements of "effective ASEAN equity". This enables it to comply with the local equity requirements of any ASEAN member country by counting the local equity participation in all other ASEAN countries on a cumulative basis towards that local requirement. The definition refers to "ultimate holdings", this means that indirect holdings in related entities can be included in the cumulative total[87]. For example, if a hypothetical US company Computech has a Singapore subsidiary with local Singapore investors owning 10%, it would need only an additional 40% of local shareholdings to meet the requirement in Malaysia for 50% local equity; and then only further 1% to meet the Thai minimum of 51%.

Therefore, non-ASEAN investors can enjoy free mobility intra-ASEAN if they have "ASEAN investor" status under the AIA, by virtue of the NT/MFN treatment

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foreign shareholders, partners that own more than 41% equity will be regarded as a foreign entity. Only under Singapore law is there no definition of foreign investor.

under AIA. Moreover, as discussed above, the short-term measures bind ASEAN countries to allow 100% foreign equity holding in a company submitted for approval from 1st January 1999 to 31st December 2000. This even further accelerates the elimination of discrimination against foreign investors and encourages them to invest in ASEAN immediately, within 1999-2000, in order to be entitled to the special privileges and NT/MFN treatment under AIA.

Regarding the implementation of NT with the 10-year differential between ASEAN investor and non-ASEAN investors, in fact, the rationale behind this time frame is not only specified as a grace period for fully implementing AIA, but also to stimulate foreign investors to invest immediately in any ASEAN country. If they do so now, they can be regarded as ASEAN investors and immediately be entitled to the NT/MFN treatment. Once they invest in any ASEAN country they are regarded as juristic persons of an ASEAN country and are able to move freely intra-ASEAN, because ASEAN countries have committed themselves to mutual NT, subject only to the TEL and SL. So non-ASEAN investors, if they invest in an ASEAN country now, need not wait till the year 2010 when NT will extend to all investors.

5.3.7 AIA and Industrial Schemes

In conjunction with the launch of the AIA, other industrial schemes (both revised and new schemes) are to be implemented based on preferential treatment. Prior to the launch of AIA, ASEAN had implemented some other industrial programs such as the Revised Basic Agreement on ASEAN Industrial Joint Ventures of 1987, the Memorandum of Understanding on the Brand-to-Brand Complementation Scheme of 1988 (discussed in Chapter 2), and the ASEAN Industrial Co-operation Scheme (AICO) of 1996. These programs are based on preferential regimes extended among

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[87]. A technical issue could be made of the term "ultimate holding" if the entities formed in ASEAN are all subsidiaries of a non-ASEAN entity, so that local investors in one have no "ultimate holding" in

ASEAN members. For instance, the AICO scheme[88] is to encourage companies located and operating in different ASEAN countries to co-operate with one another in the manufacture of approved AICO products. A minimum of two companies in two different countries is required to form an "AICO arrangement". The major privilege of AICO is that approved AICO products will enjoy preferential tariff rates of 0-5% for all ASEAN countries immediately upon approval of such an AICO arrangement. The immediate application of the 0-5% preferential tariff rate will provide a head start to AICO products compared to non-AICO products, since the general reduction of tariff to the 0-5% range will not occur under the CEPT until 2003. Other incentives include local content accreditation where applicable, and other non-tariff incentives to be provided by the participating member countries. The preferential tariff rates of 0-5% will also be applicable to the importation of intermediate products and/or raw material inputs for the manufacture of AICO Final Products and/or AICO Intermediate Products. The scheme is open to any company that fulfils the criteria: incorporated and operating in any ASEAN country; having a minimum 30% ASEAN national equity[89]; and undertaking resource pooling, industrial complementation or industrial co-operation activities.

These ASEAN industrial programs implement the regional industrialisation program model as they involve regimes for encouraging intra-regional investment by the setting up of regional enterprises with capital from more than one member country. They encourage cross-border investment by way of regionally integrated enterprises and projects (UNCTAD, 1999: 16-17).

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another. To avoid doubt, they could be structured as sub-subsidiaries.

[88]. See explanation of AICO Scheme at the ASEAN website, http:/www.aseand.or.id.

[89]. However, this requirement is exempt during the implementation of short-term measures between 1st January 1999 to 31st December 2000 for encouraging foreign investment into the region. Therefore, 100% foreign equity holding in a company established in any ASEAN country is allowed and entitled to the preferences provided.

Thus, ASEAN has concertedly liberalised trade and investment intra-ASEAN so that all projects implemented are interactive and responsive to each other[90]. While the intra-ASEAN market has been growing[91] and becoming increasingly liberalised, ASEAN has been liberalising investment that will further enhance trade flows from within and from outside the region. ASEAN responded to the crisis by pursuing financial and economic reforms and boosting the region's competitive edge through accelerated implementation of its economic liberalisation policies and programs, such as the ASEAN Free Trade Area, the ASEAN Investment Area and the ASEAN Industrial Co-operation Scheme (AICO).

With the interactive implementation of AIA, AFTA, AICO, and the short-term measures, foreign investors have been signalled that if they invest in ASEAN now they can be entitled to all privileges granted under such agreements, even NT/MFN treatment and the advance preferential tariff rate of 0-5% under AFTA. Foreign investors responded immediately to the privileges offered by ASEAN. For instance, in January 1999, Siemens AG established a regional trade and investment centre in Thailand and increased its equity in Siemens (Thailand) from 49% to 74.5% of the

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[90] . See Short term Measures in Annex 12, which ASEAN countries allow 100% equity owned by non-ASEAN investor, and under AIA, "ASEAN investors" are entitled to national treatment, and all industries are opened to them (subject only to negative lists) have facilitated liberalised investment, and these measures have also facilitated service trade through commercial presence so that non-ASEAN service providers can establish themselves in ASEAN countries and can freely mobile within the region. See section 3. of the Short Term Measures for individual ASEAN country liberalisation. Also IMF rescued packages include privatisation scheme, open financial sector, telecommunication, and other service sectors of ASEAN countries. Also see Table 6 GATS-Plus Commitments of ASEAN Countries showing ASEAN countries liberalised services extensively. AICO Schemes which reinforce trade and investment liberalisation by providing 0-5% tariff rate to all products produced under AICO Schemes. All these measures function in a way that they are all complementary, and facilitate both trade and investment lberalisation. Moreover, as I pointed out the four main areas that ASEAN countries generally restrict FDI: entry restriction; equity limitation; performance requirement; and investment incentive. Now ASEAN countries have deregulated them, as mentioned above, allow 100% equity holding by foreign investor, open industries that closeed to foreign investor, committed to lift out performance requirement and coordinate among ASEAN members in providing investment incentives. See ASEAN Secretariat (1998a) *Compendium of Investment Policies and Measures in ASEAN Countries.* Jakarta: The ASEAN Secretariat. Also see ASEAN Secretariat (1998b) *Handbook of Investment Agreements in ASEAN.* Jakarta: The ASEAN Secretariat.

[91]. ASEAN is now composed of 10 countries and has a total population of about 500 million, a total area of 4.5 million square kilometers, and a combined gross national product of US$ 685 billion.

company's equity[92]. Fujitsu also launched its biggest production base of hard disc drives in Thailand in 1999[93]. Also US oil giant Caltex relocated its global operational headquarters to Singapore in March 1999[94]. The Messer Group made its largest-ever single investment outside Germany, in Singapore[95]. 3 COM has opened its company's largest production base in Singapore with a US$ 70 million investment[96].

AIA thus indicates a new direction for ASEAN to balance deeper regional integration and "Open Regionalism". While it enhances intra-ASEAN economic integration, it also opens the door to non-ASEAN investors. Moreover, individual ASEAN countries have also unilaterally liberalised their trade and investment regime, by keeping their margin of preference as low as they can so that market access is more available for non-ASEAN enterprises[97].

5.4 The ASEAN Framework Agreement on Services

5.4.1 Introduction

The ASEAN Framework Agreement on Services (AFAS) was signed on 15th December 1995[98] resulting from the 5th ASEAN Summit Meeting, pursuing the objectives of the Singapore Declaration of 1992, which provided that ASEAN shall move towards a higher plane of economic co-operation and regional integration.

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92. The centre would support the activities of Siemens AG joint ventures in the whole region, particularly in the telecommunications, transport, medical systems and power generation sectors. BOI Thailand Announcement, No. 18/2542 (O.10) 27th January 1999.

93. BOI Thailand announcement, No. 18/2542 (O.10) 27th January 1999.

94. Singapore Investment News, January 1999.

95 Messer Griesheim GmbH of Germany and Texaco Nederlands B.V., a subsidiary of Texaco Inc of White Plains, NY, will build a US$ 200 million synthesis gas production facility on Singapore Jurong Island. Singapore Investment News, January 1999.

96. With the opening of the company's largest production facility in Singapore, 3Com becomes the first global networking company with a manufacturing presence in Asia. Singapore Investment News, January 1999.

97. For example, Indonesia has reduced tariff rates beyond WTO commitments, see http:/www.wto.org/wto/reviews/indonesia.htm, WTO-TPRP report on Indonesia, meeting date 3rd-4th December 1998.

98. The ASEAN Framework Agreement on Services was done at Bangkok, Thailand on 15th December 1995 and The Protocol to Implement the Initial Package of Commitments under the ASEAN Framework Agreement on Services was done at Kuala Lumpur, Malaysia on 15th December 1997.

AFAS thus aims[99] to liberalise trade in services in the region to facilitate the realisation of AFTA by substantially eliminating restrictions on trade in services[100] among ASEAN countries in order to improve the efficiency and competitiveness of the provision of services in the region.

Since the majority of the ASEAN countries[101] are members of GATT/WTO and they individually have to comply with GATT/WTO rules, they concertedly agreed to commit to the rules and principles of GATS at a regional level[102]. Art. V of GATS[103] permits any WTO member to enter into an agreement to further liberalise trade in services with other countries, provided that such agreement has "substantial sectoral coverage", and aims at the elimination of substantially all discrimination among the members in the sectors covered through the stand still and roll back principles. Art. V is an exemption to the MFN requirement under the GATS, in addition to services specified in individual MFN exemption lists (which are subject to a review and time limit under the Annex). Its rationale is to encourage regional economic integration and it is modelled on Art. XXIV of the GATT, recognising that implementation of regional

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[99]. Art. 1 of the Framework Agreement on Services stated its objectives that "(a) to enhance cooperation in services amongst Member States in order to improve the efficiency and competitiveness, diversify production capacity and supply and distribution of services of their services suppliers within and outside ASEAN; (b) to eliminate substantially restrictions to trade in services amongst Member States; and (c) to liberalize trade in services by extending the depth and scope of liberalization beyond those undertaken by Member States under the GATS with the aim to realise a free trade area in services".

[100]. Art. 1 (a) and (b) of the ASEAN Framework Agreement on Services stated its aims as "to enhance cooperation in services among ASEAN member countries in order to improve the efficiency and competitiveness, diversify production capacity and supply and distribution of services of their suppliers within and outside ASEAN", and "to eliminate substantially restrictions to trade in services among member countries".

[101]. Only Vietnam and Laos are not members of GATT/WTO.

[102]. The ASEAN Framework Agreement on Services provided in the preamble that "Reiterating their commitments to the rules and principles of the General Agreement on Trade in Services (hereinafter referred to as 'GATS') and noting that Art. V of GATS permits the liberalizing of trade in services between or among the parties to an economic integration agreement".

[103]. Art. V of GATS permits the liberalizing of trade in services between or among the parties to an economic integration agreement provided that such agreement "(a) has substantial sectoral coverage, and (b) provides for the absence or elimination of substantially all discrimination, in the sectors covered under subparagraph (a) through: (i) elimination of existing discriminatory measures, and/or (ii) prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable of time frame, except for measures permitted under Arts. XI, XII, XIV and XIV bis."

liberalisation of trade in services may well form part of a wider process of economic integration and further integrate a regional market into the global market (World Trade Organisation, 1999: 166). Therefore, the AFAS is intended as a GATS-Plus scheme, to liberalise trade in services by expanding the depth and scope of liberalisation beyond the commitments undertaken by the member countries under the GATS, with the aim of realising a free trade area in services in this region[104]. Thus, ASEAN countries affirm to extend one another preference in trade in services.

The AFAS can be regarded as the selective liberalisation model, which offers right of entry and establishment only in specific sectors committed by member countries, since AFAS, like GATS, is a 'bottom up' approach. Therefore, a right of entry or establishment of service suppliers in receiving countries, either in the mode of commercial presence or presence of natural person, may exist only where member countries make specific commitments on market access. In service sectors for which a member country undertakes market access commitments, the member country must specify any condition or limitations which it wishes to maintain, either on (i) market access, or (ii) on (post-entry) national treatment. Thus, in the absence of an express reservation, member countries cannot restrict or require, for instance, specific forms of legal entity or joint venture through which a service must be provided, or impose limits on participation of foreign capital or limits on foreign shareholding. The receiving countries therefore have considerable discretion in determining the extent of the market access, and they may expressly reserve powers to limit the mode of supply (UNCTAD, 1999: 20). Under AFAS, ASEAN countries committed themselves to offer market access in more specific sectors and sub-sectors than they did in GATS and also fewer limitations on market access and national treatment.

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[104]. Art. I (c) of the ASEAN Framework Agreement on Services.

The commitments on market access involve the liberalisation of the pre-entry stage, and under GATS and AFAS, are subject to the limitations or conditions made by member countries. At the post entry stage, the non-discrimination principle of national treatment applies if a member country bind itself to grant such a right. However, even if a state agrees to grant market access the NT obligation may remain "unbound", which means that no post-entry NT commitments are made. Even if a state does bind itself on NT, this can be subject to conditions and exclusions.

5.4.2 Liberalisation of Trade in Services

Under the AFAS, ASEAN countries commit themselves to liberalise trade in services in a substantial numbers of sectors within a reasonable time-frame through the principles of stand still and roll back[105]. Under Art. IV, they will negotiate to liberalise the specific service sectors beyond the commitments already made under GATS by each individual member country (see Diagram 1 summary of ASEAN country schedules under GATS, p. 350). AFAS involves market access commitments that are preferential in nature, as Art. IV (1) specifies that ASEAN countries will accord preferential treatment to one another on a MFN basis. However, MFN exemptions are still available under GATS-Plus, even though there was no MFN exemption clause as such in Art. IV or in the AFAS Framework Agreement itself. It appeared in the Protocol to Implement both the initial and Second Package of Commitments under the AFAS and they are integral parts of AFAS Framework Agreement[106]. Therefore, MFN

[105]. Art. III of AFAS provided that "Pursuant to Art. 1 (c), Member States shall liberalize trade in services in a substantial number of sectors within a reasonable time-frame by: (a) eliminating substantially all existing discriminatory measures and market access limitations amongst Member States; and (b) prohibiting new or more discriminatory measures and market access limitations".

[106]. Section 3 of the Protocol to implement the second package of commitment under the ASEAN Framework Agreement on Services reads: The Annexes to this Protocol shall consist of the Horizontal Commitments, Schedules of Specific Commitments and the Lists of Most-Favoured-Nation Exemptions. And Art. VIII of the AFAS agreement provided that: Schedules of Specific Commitments and Understanding arising from subsequent negotiations under this Framework Agreement and any other agreements or arrangements, Action Plans and Programmes arising thereunder shall form an

exemptions also exist in the GATS-Plus scheme. Nevertheless, there is neither a provision for reviewing the MFN exemptions nor a period for phasing out such exemptions. This seems to leave them to be eliminated under Art. III which envisages that all existing discriminatory measures and market access limitations are subject to stand still and roll back principles, so that MFN exemptions should be phased out eventually. MFN exemptions also can be regarded as included in each negotiation round of the specific commitment package. ASEAN countries can be flexible in negotiating their specific sector commitments and exemptions, as liberalisation of trade in services is a 'bottom-up' process. However, any limitations are subject to the general obligation and commitment under Art. III of AFAS to be progressively phased out. Preferential treatment under GATS-Plus and all commitments under GATS will be extended to all ASEAN member countries including those that are non-WTO members (Laos and Vietnam).

The first round of negotiations of ASEAN services liberalisation began in 1996 and ended in 1998 in the initial seven priority sectors, which have been identified at the 5th ASEAN Summit: air transport, business services, construction, finance, marine transport, telecommunications, and tourism. Under the Hanoi Action Plan of December 1998 for accelerating the implementation of AIA and AFAS, ASEAN countries agreed to extend the sector coverage in GATS-Plus to cover all services sectors and all modes of supply[107], and the second round of negotiations began in 1999 and will end in 2001.

5.4.3 ASEAN Commitments under GATS

Since commitments under AFAS must be beyond those under GATS, a review of the reservations and exclusion from GATS commitments of ASEAN

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integral part of this Framework Agreement. Therefore, section 3 of the Protocol is part of AFAS agreement.

countries will indicate the kinds of preferential commitments that may be negotiated in this GATS-Plus scheme. Looking first at the ASEAN country schedules under GATS for horizontal commitments[108] (see Tables 1 and 2, p. 347-8), the most common limitations imposed are in the areas of market access involving both commercial presence and the presence of natural persons. Particularly, commercial presence is often restricted by requiring foreign service providers to enter through joint ventures whose ownership must still be retained by domestic nationals who can serve as members of the board of directors of the company[109]. This requirement is dominant in all ASEAN countries' investment regimes, as commercial presence involves foreign direct investment. Additionally, most ASEAN countries have restricted the entry and duration of stay of foreign managers, executives and technical specialists. Indonesia, Malaysia, the Philippines, and Thailand impose restrictions on ownership of land by foreign service providers. Brunei, the Philippines, and Singapore impose restrictions on the number of foreign nationals who can be members of the Board of Directors of a company.

Regarding specific sectoral commitments, ASEAN countries made commitments in air transport, business services, construction, finance, marine transport, telecommunication and tourism under which they made limitations on market access specific to particular service sub-sectors, and limitations on the NT principle. These limitations covered the four modes of supply: cross-border supply, consumption abroad, commercial presence, and the presence of natural persons (see

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[107]. Statement on Bold Measures, para 10. See http:/www.asean.or.id/economic/invest/sum_bold.htm.
[108]. Horizontal commitments refer to commitments that are common or run across all service sectors of contracting parties.
[109]. ASEAN Secretariat's Information Paper: Member Country Commitments under the GATS. Document No. 8. Second Meeting of the Ad-Hoc Working Group on ASEAN Co-operation in Services, 17th-19th January 1995, Makati, the Philippines.

detailed specific sectoral commitments and exemptions of ASEAN countries made under GATS in Tables 4 and 5, p. 351-4).

In particular, the banking service sector includes the sub-sectors of acceptance of deposits, lending, trading of financial instruments (which includes foreign exchange), and financial asset management. The major limitations consist of branching restrictions, and ownership restrictions such as requirements that foreign service providers enter in joint ventures with local banks. In the insurance sector: life insurance, non-life insurance, reinsurance and broking and other agency services, the main limitations are on market access ranging from requiring prior approval for the establishment of new companies to limiting foreign shareholding in such companies. Malaysia imposes an economic needs test before allowing insurance companies into the domestic market. Indonesia requires higher paid up capital for foreign companies. Other common limitations are restrictions on the membership in the Board of Directors as well as on the hiring of managerial or technical personnel.

In maritime transport: passenger services, freight services and maintenance and repair of vessels, there are fewer limitations on market access and national treatment in this sector compared to the others. Brunei has no limitation at all on market access; Singapore has limitations on market access only on the presence of natural persons; Thailand has restrictions involving freight traffic between Thailand and Vietnam as well as Thailand and China that may be not fully participated in by third countries.

As regards the air transport sector, Indonesia and Singapore have no specific schedule of commitments in air transport, and the others made commitments but subject to limitations on market access. On leasing of aircraft, Brunei and Malaysia allow commercial presence only through a representative office while the Philippines allows lease contracts subject to approval by its air transport authority (the Civil

Aviation Board). The Philippines has no limitations on commercial presence in case of maintenance and repair of aircraft, while Thailand's measures with regards to commercial presence are unbound. In the case of general sales and cargo sales, distribution through CRS is allowed by Thailand only for airline offices and one general sales agent office. In addition, such providers must use the Thai public telecommunication network.

Finally, as regards MFN exemptions (see Table 3, 349), ASEAN countries have extensive MFN exemptions under GATS. These exemptions include limitations on foreign equity participation and the entry of semi-skilled or unskilled workers. All ASEAN countries have MFN exemptions in their financial and transport sectors. Brunei, Malaysia, the Philippines, and Singapore have MFN exemptions covering all sectors. Also Brunei and Singapore have exemptions in legal services. Singapore has exemptions in broadcasting, computer reservation systems, reinsurance and retrocession, Malaysia has an exemption in advertising, and Thailand has exemptions in business services, and computer reservation systems. Most of these sectoral MFN exemptions are the result of broad national policies (e.g. limitations on equity participation of foreign investors) or the result of bilateral agreements involving reciprocal favourable treatment that are allowed under the GATS (Art. II. 2)[110]. For instance, Thailand has restrictions involving freight traffic as mentioned above, based on bilateral agreements made between Thailand and Vietnam, and Thailand and China.

From this review, ASEAN countries need to consider, under GATS-Plus, to improve the coverage of service sectors to be liberalised, both horizontal and specific sectoral service commitments and mode of service supply as well as to refrain from MFN exemptions in such service sectors. Since Art. V of GATS permits preferential

treatment among members of a regional economic integration agreement, provided that such arrangements have substantial sector coverage and eliminate substantially all discrimination among the members, AFAS cannot be implemented on a piecemeal or selective basis. Therefore, ASEAN countries need to liberalise service sectors on a broad base of both horizontal commitments and specific sectors.

5.4.4 Preferential Treatments Extended to ASEAN Countries under GATS-Plus Packages

ASEAN countries' offers under GATS-Plus scheme (see detailed offers in Table 6, p.355-8) are an improvement on their commitments under GATS in some or all of the seven sectors and sub-sectors involving modes of supply, market access and national treatment. The service sectors in which individual ASEAN countries offer preferences over GATS are summarised in Table 7.

Table 7
Summary of GATS-Plus Commitments of ASEAN Countries
(symbol X- commits to liberalise, symbol - do not commit to liberalise)

	Brunei	Indonesia	Laos	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
Air Transport	X	X	X	-	X	X	X	X	X
Business Services	X	X	X	X	X	X	X	X	X
Construction	X	X	X	X	X	X	X	X	X
Financial Services	-	X	X	-	X	X	X	X	X
Marine Transport	X	-	X	-	X	X	X	X	X
Telecommunications	-	X	X	X	X	X	X	X	-
Tourism	-	X	X	X	X	X	X	X	X

Source: Compiled by the author from ASEAN countries schedules under GATS-Plus as at September 1998.

It needs to be made clear here that offers made by each individual ASEAN country summarised in Table 6 and 7 are the GATS-Plus commitments. So if an

[110]. WTO reported that "MFN exemptions have been claimed by most current and prospective WTO Members. Roughly 350 measures are involved, mainly bilateral or plurilateral agreements without a

individual ASEAN country did not make further offers in a particular sector here it does not mean that the country did not commit in such sector at all, but rather that it may already have made offers in such sector under GATS quite extensively (see Tables 1-5). On the other hand, where ASEAN countries made offers under GATS-Plus it does not mean offers have not been made at all under GATS, but rather that the additional offers were made in more sub-sectors of that sector under GATS-Plus.

Laos and Vietnam[111], who are non-WTO members, made offers in all sectors because they did not commit under GATS before. Malaysia did not make further offers in financial sectors other than those made under GATS, because after the 1997 crisis Malaysia has been cautiously overseeing its financial sector. Scholars[112] also widely accepted that before liberalising the financial sector there should be a strengthening of the legal infrastructure, and of supervision and prudential measure, and this increasing scrutiny may entail a slow-down in liberalisation or deregulation for a time. In some cases, like the financial sector, it is possible that activities that have never been regulated will become regulated because of greater attention to prudential concerns. The restructuring of the financial sector in Asia after the crisis shows that adequate prudential measures, supervision and legal framework should be established before further liberalisation.

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fixed termination date". See World Trade Organization, 1999: 193.

[111] Vietnam did not commit to liberalise its telecommunication sector in this schedule because the country has modest telecommunication infrastructure and it needs to develop this service sector before welcoming foreign service providers.

[112] See, for example, Raghavan, Chakravarthi, (1997) "Financial Liberalisation" *Third World Resurgence.* No. 86, October. Also UNCTAD's Secretary-General, Rubens Ricupero has advised the countries of the South to retain a degree of flexibility on measures to control movements of capital until a satisfactory international agreement is reached on this issue. He further suggested that "you need to take into your level of development, the financial institutions of each country, the current state of domestic supervisory capabilities, the current state of your financial system as a whole". The situation varies from country to country, and it is difficult to generalise. But I hope each country will make its decisions in the light of their own situations, and this will be seen as a valuable contribution to the liberalisation of the financial services sector.' (TWR, No. 86, October, 1997).

5.4.5 ASEAN Service Providers

A key question is who can be entitled to the offers under AFAS. AFAS is a regional economic integration agreement implemented under Art. V of GATS, and therefore preferential treatment under AFAS would in principle be given to service providers of the ASEAN member countries or "ASEAN service providers". Although AFAS did not define "ASEAN service providers", it did provide for the denial of benefits in Art. VI of AFAS:

> The benefits of this Framework Agreement shall be denied to a service supplier who is a natural person of a non-Member State or a juridical person owned or controlled by person of a non-Member State constituted under the law of A Member State, but not engaged in substantive business operations in the territory of Member State(s).

Even though Art. VI of AFAS is a denial of benefits clause and not a definition clause, the statement in Art. VI of AFAS was partially taken from the definition clause of Art. XXVIII of GATS, so it may be said that Art. VI of AFAS implies a definition of legitimate service providers who are the ones not denied by Art. VI. This presumption is reinforced by the fact that AFAS reiterated ASEAN countries' commitments to the rules and principles of GATS and the provisions of GATS are enshrined in AFAS, particularly as mentioned above.

Art. VI denies benefits or privileges to a juridical person owned or controlled by non-ASEAN persons only if such a juridical person is not "engaged in substantive business operations" in an ASEAN country. Therefore, a company duly constituted under the laws of an ASEAN country (which is, in principle, an ASEAN juridical person) if it engages in "substantive business operations" in an ASEAN country is thus entitled to the benefits and privileges offered under AFAS as an ASEAN service provider. Consequently, non-ASEAN nationals who establish a company in an ASEAN country, which genuinely engages in substantive business in that country, are able to enjoy benefits under AFAS. Since there are no other limitations or specific

conditions under AFAS, such a foreign-owned company can gain advantages from the more liberal establishment rule to benefit from the liberalisation in intra-ASEAN services trade, subject only to limitations or conditions made by each individual ASEAN country under GATS-Plus, which are also generally applied to all ASEAN service providers alike.

Thus, as with the AIA, the AFAS offers opportunities for non-ASEAN-owned entities to benefit from the more rapid liberalisation of the intra-ASEAN market. Like the AIA also, it will put pressure on each ASEAN country to liberalise its national entry requirements, since a foreign-owned service provider once admitted to an ASEAN country may thereby gain access to the whole ASEAN market. Indeed, AFAS potentially goes further than the AIA, since it has no cumulative equity requirements (although each country may still retain some foreign shareholding limitation).

The key issue is the meaning of "substantive business" which must be engaged in by the foreign-owned company. The meaning of substantive and the meaning of business should be considered together. Substantive means real or genuine thus substantive business should mean a real or genuine business engaged by a company. The company can be entitled to privileges under AFAS only if it has already engaged in such real or genuine business operations in one ASEAN country (the one where it is established) before it can provide such services in other ASEAN countries. A further issue is whether such business can be any kind of business, or needs to be an actual services business which will be provided in the other ASEAN countries. This has to be interpreted in conjunction with the earlier interpretation of substantive business, which means a real business. If a company engages in one business operation but seeks to provide another business service elsewhere, the company obviously is not already engaged in such substantive or real business service. So substantive business should

mean a real or genuine business, which it seeks to provide throughout the ASEAN region. For instance, a foreign-owned company established in Singapore engaged in the construction service business would be entitled to the rights and benefits offered under AFAS by other ASEAN countries to gain market access in the countries which have offered such rights in the construction service sector. But if this company engages in insurance business in Singapore and seeks to provide construction services in other countries, it could not do so since it is not engaged, at that time, in a real or genuine business in construction services, even though it has a real business in insurance. Since the liberalisation of services intra-ASEAN aims to strengthen and enhance trade in services in the region in order to improve the efficiency and competitiveness of their service industries, ASEAN countries would allow non-ASEAN owned providers only if they are part of the ASEAN economy and really contribute economic value to the ASEAN economy. Therefore, ASEAN countries welcome non-ASEAN nationals to establish a company and operate substantive service businesses in ASEAN countries and enjoy the rights and privileges offered by ASEAN countries under GATS-Plus. In this way, ASEAN fulfils the dual objectives of intra-ASEAN liberalisation in services and encouraging market access by service providers from outside the region through the establishment of foreign-owned companies in ASEAN countries. This means further enhancing FDI flows into the region.

Tables 6 and 7 show that the ASEAN countries' offers in GATS-Plus go beyond those committed under GATS in various sectors and sub-sectors, particularly in telecommunications, construction, financial and business service sectors. Tourism is booming in the ASEAN region because all ASEAN countries are liberalising regional tourism services. Maritime transport, which is generally closed under GATS, is more

liberalised under GATS-Plus. Laos opened her maritime transport to all modes of supply and granted both market access and national treatment. Even though Laos is a land-locked country, her liberalisation of maritime transport in ASEAN is useful at the regional level because any country, whether or not it has a coastline, has the right to have ships navigating on the high seas. For instance, Austria and Switzerland are land-locked countries but they have shipping interests (UNCTAD, 1989: 152). Therefore, if Laos established a shipping registry and introduced a Laos flag it would be open to all ASEAN ship-owners. On the other hand, such a registry could permit ship-owners anywhere in the world to register their vessels in Laos hence undertaking transportation FDI in the country and in the region. This is another example of complementary regional and international liberalisation.

Vietnam granted national treatment and market access to service providers under business service sectors for both commercial presence and presence of natural person, in the sub-sectors of engineering services, in accounting and auditing services, and in legal taxation services. This is due to Vietnam's new emerging market and the lack of such specialists and professionals caused by the prolonged Vietnam War. The inflows of trade and investment to Vietnam came mainly from Asian and ASEAN countries, and have been accompanied by service providers in business service sectors. For instance, there are many Thai law firms[113] and lawyers who provide legal services in Vietnam because Thai investors[114] in Vietnam need legal services from their

[113] . For example Tilleke & Gibbins R.O.P. established in Thailand in 1893 by Pha Yod Muang Kwang, a Thai governor and Mr. William Alfred Tilleke, a Ceylonese, later joined by Mr. Raph Gibbins. It is now the oldest and largest independent law firm in Southeast Asia, composed of more than 70% Thai lawyers, and providing legal services in Vietnam and other Southest Asian countries. Boonchoo Blumenthal & Richter Ltd, an international law firm based in Bangkok composed of 35 % Thai lawyers is also providing legal services in Vietnam and also other countries in the region, and Baker & Mckenzie (Thailand), the biggest network law firm, is also well established through a branch in Vietnam providing legal services by Thai lawyers in.

[114]. Investors from Thailand have engaged in services trade and investment in Vietnam since the very beginning when Vietnam was transformed from the "battle field" to "trading field" initiated business relation between the two countries by the Thai Prime Minister Chatchai Choonhawan in 1989. Since

national lawyers who are trained in both Thai and Vietnamese law. Also accountants, auditors, and engineers are needed by Thai investors in Vietnam. The cases are the same for Singaporean or Malaysian investors. Therefore, Vietnam welcomes these business service providers. Since Vietnam endeavours to attract FDI and trade into the country, the opening of related service sectors may help facilitate business operations and promote FDI through the service providers who give advice and professional services to their customers.

Construction services, especially on-site construction work, are also opened in all ASEAN countries under GATS-Plus. This sub-service sector was not offered under GATS because it mainly involves commercial presence or the presence of natural persons of service providers in the territory of the country where services are provided. ASEAN countries' offers in this sub-sector enable service providers from other ASEAN countries to gain market access in the host country through local presence that also facilitates construction investment intra-ASEAN.

In particular, ASEAN countries liberalise their financial sector under GATS-Plus, in compliance with national policies to restructure and reform financial markets that have resulted in more generally liberal ASEAN financial market. Under GATS-Plus, Indonesia allows ASEAN banks to open branches in three new locations: Padang, Manado, and Ambon. Myanmar allows ASEAN banks' representative offices to be established in the country. The Philippines allows ASEAN commercial banking generally to gain market access, and especially Thailand allows 100% foreign-owned securities companies operating in the market in all modes of supply (1b, 2a, 3a, and 4b). Vietnam also allows 100% foreign equity in all insurance companies operating in the market. Singapore is liberalising the insurance sector in both life and non-life

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then Thai investors have continued investing in this country mainly in manufacturing industries but also in service investment such as hotel, restaurant and legal professional (Ministry of Commerce, Bangkok,

insurance sub-sectors. These improvements mainly involve commercial presence that previously was unbound under GATS.

The GATS-Plus improvements over GATS are in fact reinforcing generalised liberalisation of services in ASEAN. For example, ASEAN countries committed themselves under GATS to liberalise market access to their financial markets via commercial presence, but subject mainly to restriction on foreign shareholding in a finance company, insurance company, security company or commercial bank, generally at a maximum of 25-30%. Under GATS-Plus, ASEAN countries allowed (even foreign-owned) ASEAN companies to have an equity holding up to 49%[115], 60%[116] or even 100%[117] of paid-up capital in a financial company, insurance company, commercial bank, or securities company. Under GATS, ASEAN countries bound themselves to only existing companies but left unbound the granting of new licenses, which remain subject to approval; but under GATS-Plus ASEAN countries have agreed to grant more new licenses in the financial services sector. For instance, Thailand agreed to grant 50 licenses for opening new commercial banks, the Philippines bound itself to grant 10 new licenses for establishment by ASEAN banks. Therefore, if a non-ASEAN service provider initially entered into the ASEAN market under GATS, once it is established in one ASEAN country it can enjoy access to the whole region under GATS-Plus, including the right to establish in other ASEAN countries. Recently Prudential, a British insurance company, established itself in Thailand under GATS. Prudential Insurance can now also move into other ASEAN

Thailand : *Thai Investment in Vietnam*, mimeograph).

[115]. Indonesia allows acquisition of local existing bank through the purchase of up to 49% of the shares of locally incorporated banks listed in the stock exchange.

[116]. The Philippines allows acquisition of up to 60% of the voting stock of an existing domestic bank or investing in up to 60% of the voting stock of a new banking subsidiary incorporated under the laws of the Philippines.

[117]. Thailand allows 100% foreign equity participation in securities companies and in asset management companies. Vietnam allows 100% foreign-owned company providing services in life, accident and

countries under GATS-Plus. Similarly, if any foreign insurance company becomes established in Vietnam where 100% equity is allowed, it can further enter into other ASEAN countries as a Vietnamese company.

5.4.6 Mutual Recognition under AFAS

Since border barriers (tariffs and other controls) imposed by nation states have been gradually eliminated or reduced, flows of trade and investment appear to be increasing, facilitating the openness of the world economic system. Since then, regulatory differences and variable internal requirements among nation states have come to be regarded as "non-tariff barriers" hindering, cross-border trade flows, even though they are not intended to be protectionist (Mathis, 1998: 7). Non-tariff barriers are much more difficult to eliminate. In the international sphere, under GATT, there were initial discussions of the measures to combat non-tariff barriers since the international negotiations in the Tokyo Round. However, it was only in the Uruguay Round that measures for eliminating or reducing non-tariff barriers have been formally agreed, especially in the TBT and SPS agreements, and also under GATS Art. VII, by encouraging the approach of mutual recognition as well as common international standards applicable by WTO Member States.

The principle of mutual recognition (MR) has been generated, initially in the EU, to facilitate the implementation of regional liberalisation due to the complexity and diversities of national laws, as an alternative to harmonisation. MR has been developed by the ECJ, especially in the Cassis de Dijon case[118], in which the Court decided that national regulatory requirements, even if formally non-discriminatory ('indistinct'), could constitute barriers to trade that is contrary to the Treaty of Rome.

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health insurance services, non-life insurance, reinsurance, services auxiliary to insurance and financial leasing services.

So, in principle, the ECJ ruled that what is legally produced and sold in one country should be legally marketed in another. Therefore, internal national regulations and requirements may not be excessively imposed on imported products, and such regulations can be regarded as having an equivalent effect to quantitative restrictions that are invalid measures applicable to imported goods under Art. 30 of the Rome Treaty. This gave rise to the 'new approach' of the EU towards harmonisation, which encourages mutual recognition and its mandated recognition of other Member States' regulations, so that harmonisation of standards is only undertaken when and to the extent it is considered necessary. Member countries may still maintain their internal rules and regulations applicable to their domestic products, while permitting importation of "qualified" or "validly produced" products from other member countries. However, the Court also accepted that compliance with the importing country's rules may be necessary for specified reasons, especially health and safety and consumer protection[119]. This brings pressure on the EU member countries to agree on minimum harmonised standards or regulatory requirements, leading to the further harmonisation of rules or common standards. Consequently, the new approach enhances the complementarity and interaction between national rules and regional-level harmonised regulations. So in the EU mutual recognition operates in conjunction with some level of harmonisation (Bratton, William; McCahery, Joseph; Picciotto, Sol & Scott, Colin; 1996: 32). MR is therefore becoming a crucial instrument enhancing free trade either at regional or international level and it is now pursued by various

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[118]. The judgment delivered by the Court of Justice in Case 120/78 (1979) ECR 649, (1979) 3 CMLR 494. (the 'Cassis de Dijon' case) on 20th February 1979. European Community Court of Judgement Report 1979 No.1-3, Part 2, S.V6.9.

[119]. In the Cassis de Dijon case the Court accepted that "Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating to particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer". Judgement of

contracting parties at regional, bilateral, and plurilateral level, such as the MRA between the EU and the US signed in 18th May 1998[120]. MR has also been adopted by ASEAN in AFAS, as discussed below.

MR is also now encouraged by the WTO agreements i.e. the Technical Barriers to Trade (TBT) agreement and the Sanitary and Phytosanitary Measures (SPS). The TBT refers to mutual recognition both for testing procedures and for substantive product regulations. MFN and NT are both required to be granted to other WTO Members in regard to access to domestic conformity assessment procedures. For instance, if a member state has eliminated the requirements of domestic conformity assessment, this would form the basis for a level of internal treatment that must then be accorded to imported goods on the basis of NT. However, the waiving of internal assessment procedures in favour of another's procedure suggests that whether this can be done depends upon one party's receipt of sufficient assurances as to the quality of the other party's procedures. Thus, on this ground, it appears that mutual recognition may be based on member-by-member agreements or autonomous recognition, and need not be extended automatically to all other members under the MFN clause. WTO agreements ensure only that equal opportunity is granted to all member states to enter into such agreements or arrangements, so as to encourage member states to adopt the mutual recognition. This may lead to standardised national procedural requirements or to the development of further common international standards or minimum standards, which is an alternative to mutual recognition. WTO member countries are pressed to use applicable International Standards where there are such standards available[121].

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the Court of 20th February 1979, Case 120/78. European Community Court of Judgement Report 1979 No. 1-3, Part 2, S.V6.9.

[120]. OJL 031, 04/02/1999 p. 3-80 and amendment adopted by 399 D0078 (OJL 031 04.02.99 p.1)

[121]. Arts. 2 and 4 and also Arts. 5 and 6 of the TBT agreement. Legal text of TBT can be downloaded from WTO website http://www.wto.org/wto/legal/finalact.htm.

Under GATS, recognition of educational or other qualifications may be achieved through harmonisation, or may be accorded autonomously or based on agreements or arrangements enter into by Member States, bilaterally, regionally, or plulilaterally. Art. VII encompasses recognition for both conformity-assessment and equivalency aspects (further discussed below). WTO agreements also adopted the origin-designated recognition agreement and recognition of equivalent foreign product regulations, which means Member States may recognise not only their respective capacities to provide for assessment, but further acknowledge the other country's substantive internal requirements to be sufficiently equivalent to permit access without application of the importing country's domestic regulation[122]. Mathis states that the MR agreement negotiated between the EU and the US also accepted this principle.

> "In such a case, an acceptance of the other party's standard has been made, the domestic product regulation has been waived as to those goods, and the non-tariff barriers issue presented by differing standards between countries has been effectively bypassed" (Mathis, 1998: 20).

This recent development clearly shows the positive trend in the adoption of mutual recognition in facilitating free flows of trade and investment at both international and regional level. It also implies that since mutual recognition is becoming accepted, a convergence of internal requirements would develop since regulatory competition would encourage the adoption of prudential and high standards.

Within the EU, mutual recognition has gone further than the WTO agreements, since it covers both equivalent-recognition aspects together with conformity-assessment aspects, a prospect that still does not appear to be entertained by the TBT agreement. John Clarke mentioned the experiences of the EU that:

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[122]. Art. 2.7 TBT provided that "Member shall give consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations".

> "In order to permit a genuinely free circulation of goods throughout the European Community, it was necessary for the individual Member States of the Community to reciprocally recognise not only the equivalence of the product standards of other Member States, but also the validity of the tests and certificates of compliance issued by the bodies in those Member States"[123].

This advancement may need a certain level of regulatory development such as in the EU, especially the crucial role of the ECJ in developing the mutual recognition approach, that took 20 years to establish the principle and another 20 years to implement. Now I turn to discuss the MR in the case of ASEAN, as adopted in AFAS (although the level of development is still far behind the EU's).

In order to facilitate liberalisation of services intra-ASEAN, Art. V of AFAS provided that:

> "Each Member State may recognise the education or experience obtained, requirements met, or licenses or certifications granted in another Member State, for the purpose of licensing or certification of services suppliers. Such recognition may be based upon an agreement or arrangement with the Member State concerned or may be accorded autonomously".

Art. V encourages ASEAN countries to enter into agreements or arrangements to recognise education or experiences obtained, requirements met, or licenses or certifications granted in another ASEAN country, the country of residence of the service providers. Thus the conditions made by all ASEAN countries regarding qualifications or requirements of service providers would be mutually recognised for their qualifications, provided that such qualifications meet the requirements of the receiving country (substantive standard). Mutual recognition among ASEAN countries may be accorded autonomously or based upon an agreement or arrangement with the member countries concerned. However, this provision is not mandatory as Art. V stated that:

> "Nothing in paragraph 1 shall be so construed as to require any Member State to accept or to enter into such mutual recognition agreement or arrangement".

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[123]. Clarke, John (1996) "Mutual Recognition Agreements", in *International Trade Law and Regulations, Vol. 2, p. 35. Cited in Mathis, op., Cit., p. 21.*

From a legal point of view, this is a weak point of the AFAS, as mutual recognition is not made a mandatory requirement. Nevertheless, ASEAN countries tend to concertedly adopt the principle of mutual recognition and some ASEAN countries such as Singapore, Brunei and Malaysia have already extensively recognised each other's national qualifications. This is probably because of their proximity in culture, education, legal systems, religion and general social standards. These developments were validated under Art. VII GATS.

A key issue of mutual recognition in service provision is whether to recognise that the "standard" or "qualifications" of service providers and services provided complies with the substantive standards and the procedural requirements of each individual country which has adopted the principle of mutual recognition. The host or importing country may wish to retain its own substantive standard, but maybe willing to accept certification by the exporting country that an item/service provider complies with that standard. Alternatively, countries may be willing to agree a common standard, e.g. for a professional qualification, but may wish to retain certification in their own hands so that they can assure that the certification granted really reaches their standard requirements compliance, or the agreed common standard. For instance, according to Thai regulations, a medical doctor can carry out surgery only if he/she has passed certain procedural requirements tests and may be granted a certificate for surgery even though he/she may hold a medical degree from somewhere else. Also, a lawyer can practice in court and provide legal services only if he/she reaches a substantive standard. This has a series of requirements: having a law degree, passing a bar exam, being in legal practice for two years and being granted a certificate from the Thai Lawyers Society, be aged above 25 years, being of sound background, prudence and of good behaviour (these qualifications will be scrutinised by the Committee), not

being physically handicapped, and having Thai nationality. Those not able to comply with all these requirements may apply for a license from the Thai Lawyers Society as international lawyers who can provide legal services in business but cannot practice in court. Therefore, if Thailand adopted and was bound by a MRA, medical doctors or lawyers who hold their degree from their home country may be accepted by Thailand, but they may nevertheless need to satisfy procedural requirements such as passing a test to obtain a surgery certificate or passing a bar exam to obtain the certificate for practising in court.

Another key issue is whether MR is subject to MFN treatment or not. For example, if Thailand entered into a MRA with Singapore, the question is whether the commitment under such agreement will extend to other ASEAN countries automatically on a MFN basis, or even might extend to other WTO Members. On this issue, Art. V AFAS has narrowed down the applicability of such agreements so that they bind only ASEAN Members. Art. V reads:

> "These agreements or arrangements are concluded for Member State only. In the event a Member State wishes to join such agreements or arrangements, it should be given equal opportunity to do at any time".

Therefore, MRAs concluded between ASEAN countries will not automatically be extended to other WTO Members, or to other ASEAN countries that did not enter into such MRA. Art. V AFAS, like Art. VII GATS, allows Members to treat service providers of other Members differently depending on the type of qualifications granted in their country of origin. However, it does not allow Members to discriminate in the application of their substantive standards or criteria for authorisation, licensing or certification of service suppliers. In other words, there is a distinction between allowing services suppliers of certain Members to have access to the market through a fast track on the basis of a recognition arrangements on the one hand, and applying different substantive requirements to service suppliers on the other hand: an individual

who can meet the substantive standards should be allowed to qualify whatever his country of origin[124]. Since MR is either unilateral (autonomous) or based on country-by-country agreements, a MRA will not automatically extend to all WTO or ASEAN Members on a MFN basis. However, members who are parties to recognition agreements are required under Art. VII GATS to afford adequate opportunity for other interested Members to negotiate their accession to such agreements or to negotiate comparable ones with them. If recognition is granted on an autonomous basis, the Member concerned must give adequate opportunity for any other Member to demonstrate that qualifications acquired in its territory should be recognised[125].

The further issue to be considered is whether the ASEAN limitation restricting parties to the MRA is valid since, Art. VII GATS bound WTO Members to grant adequate opportunity to negotiate MRA on similar terms. Also, Member States need to notify the Council for Trade in Services of their existing recognition measures and to state whether such measures are based on agreements or granted autonomously. However, Art. IV of GATS allows WTO Members to implement regional integration and grant preferences among the member countries of such agreements, and may be considered to apply also to MRAs that give preferential recognition to member countries of the regional agreement. As mentioned above, GATS allows states to treat services providers of other Members differently depending on the level of qualifications granted in their country of origin. Therefore, states are likely to prefer to negotiate MRAs with countries that may already have levels of qualification equivalent to their own qualification. It should be noted that GATS is based on a bottom-up or positive list approach that, in principle, allows a certain level of discretion for the recipient country to commit itself in market access. Since Art. V

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[124]. See GATS: Recognition, WTO web site: http://www.wto.org/eol/e/wto06/wto6_19.htm.
[125]. See GATS: Recognition, WTO web site: http://www.wto.org/eol/e/wto06/wto6_19.htm.

permits WTO Members to enter into regional agreements for preferential treatment among some other Members for trade in services, thus to implement such regional integration, preferences such as MR limited to member countries of the regional agreement should be accepted as valid.

However, GATS Art. VII calls upon Members, wherever appropriate, to base recognition of qualifications on multilaterally agreed criteria. It also calls upon Members to work in co-operation with relevant international intergovernmental and non-governmental organisations towards the establishment and adoption of common international standards and criteria for recognition. Nevertheless, the WTO itself does not play any role in the formation of standards or development of criteria for recognition. In fact, the development of self-regulation and prudential measures, such as in financial and banking service, also indicates the trend towards interaction between national and international regulatory networks propelled by professionals in each fields of services (Picciotto, 1996: 89-123; Picciotto, 1998: 731-768).

The WTO encourages Members to develop multilateral disciplines relating to market access in order to put immediately into effect paragraph 4 of Art. VI of the GATS on domestic regulation which provided that:

> "With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia:*
>
> (a) based on objective and transparent criteria, such as competence and the ability to supply the services;
>
> (b) not more burdensome than necessary to ensure the quality of the service;
>
> (c) in the case of licensing procedures, not in themselves a restriction on the supply of the services".

These powers could be used by the GATS Council to ensure that MRAs contribute to the development of internationally agreed standards. This could also

occur if some ASEAN members also conclude MRAs with non-members so that MRAs so concluded would be complementary and interactive between ASEAN and international MR.

What ASEAN countries should consider is to strengthen their national substantive standards and procedural requirements to adequately assure the quality of services and of service providers, but bear in mind the need to apply such requirements transparently and avoid unnecessary burden on ASEAN service providers. An ASEAN Council for Trade in Services should be established to facilitate the co-ordination of ASEAN countries in negotiating MRA and help promote the development of agreed ASEAN standards and requirements where there are no such common international standards.

5.4.7 Co-operation in Service Trade among ASEAN Countries

The liberalisation of service trade under AFAS also goes beyond the GATS in that it encompasses co-operation in service trade among ASEAN countries[126]. The four areas of co-operation, provided in Art. II (2) are:

1) establishing or improving infrastructural facilities;
2) joint production, marketing and purchasing arrangements;
3) research and development; and
4) exchange of information.

This co-operation aims to promote the harmonisation of legal and economic policy as well as the enhancement of transparency of internal regulation of service provision among ASEAN countries in order to improve their efficiency and competitiveness, diversity of production capacity and supply and distribution of services suppliers within and outside ASEAN.

[126] AFAS Art. I (a) to enhance cooperation in services amongst ASEAN States in order to improve the efficiency and competitiveness, diversify production capacity and supply and distribution of services of their service suppliers within and outside ASEAN.

In particular, the crucial obligation under AFAS is the commitment of ASEAN countries to the principles of stand still and roll back that guarantee the progressive liberalisation intra-ASEAN. The 1998 ASEAN Summit decided to extend service sector coverage to all sectors and all modes of supply in principle, so that the implementation of this decision along with the stand still and roll back principles would reinforce extensive liberalisation in service trade intra-ASEAN.

The liberalisation of service trade under AFAS has reinforced the attractiveness of the ASEAN region in service sectors, as it results in an enlarged ASEAN market for such services. In particular, ASEAN's openness to welcome outsiders into the region through their establishment in ASEAN countries enables non-ASEAN firms to gain advantages both from the privileges offered under AFAS and from economies of scale generated by intra-ASEAN integration. The liberalised ASEAN market might further induce inflow of investment associated with service trade in the region.

In addition, AFAS [127] provides that it shall neither affect existing agreements nor constrain the right of members to enter into agreements not contrary to the Framework Agreement. This apparently tautologous provision seems to aim at preserving the benefits to ASEAN or non-ASEAN countries of bilateral agreements extending special liberalisation privileges. Such benefits, which would normally be required to be extended to other states under the MFN clause, may be preserved if notified under the GATS Art. II MFN exemption lists. However, it should be noted that these are in principle subject to review and roll-back. An example is the bilateral agreement between Thailand and the USA[128], which allows the US maritime transport of cargoes the rights to carry all products. This privilege does not extend to all other WTO members.

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[127]. Art. IX of the Framework Agreement on Services.
[128]. Treaty of Amity and Economic Relations.

The 1998 Heads of ASEAN Summit Meeting also agreed to initiate a new round of negotiations beginning in 1999 and ending in 2001, to expand AFAS beyond the seven priority sectors, identified at the fifth ASEAN Summit, to cover all services sectors and all modes of supply[129]. This clearly shows the commitments made among ASEAN member countries to liberalise trade in services beyond their commitments under the GATS, under which they have made more reservations than they did under GATS-Plus. However, the liberal interpretation of the "ASEAN services provider" provision encompassing eligible non-member service providers who meet the criteria or requirements for being regarded as an ASEAN service provider to be able to enjoy preferences under AFAS, facilitates and complements the generalised liberalisation of services into ASEAN from third countries.

Moreover, individual ASEAN countries are unilaterally liberalising service trade and services FDI. In particular, the measures implemented[130] by individual ASEAN countries after the crisis have dramatically opened the ASEAN services market to foreigners[131]. Despite the Asian crisis, the inflow of services FDI into ASEAN in 1998, in the aftermath of the crisis, was surprisingly impressive[132]. The increased FDI flows to the region were directed mainly to the services sector notably banking, insurance and telecommunications (UNCTAD (Overview), 1998a: 17-18).

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[129]. Statement on Bold Measures paragraph 10.

[130]. The restructuring of certain service industries in the countries affected by the crisis is providing opportunities for foreign investors, and the liberalisation of policy in respect of M&A makes the entry of foreign investors through the acquisition of assets easier than before. In addition, a factor conducive to increasing FDI in the most affected ASEAN countries is the improvement in their international cost competitiveness due to depreciation in ASEAN countries. This seems the crisis was turn to be positive for the long-term development of ASEAN countries to adjust and streamline their legal infrastructure, institutional framework, prudential measures, adequate supervision and effective policy implemented in the region. This includes the well planned liberalisation in trade and investment. See UNCTAD, 1999: 52-58. Also see UNCTAD Press Release TAD/INF/2779, 2 November 1998.

[131] . See UNCTAD (1999) World Investment Report 1999: Foreign Direct Investment and the Challenge of Development. pp. 52-58.

[132] See UNCTAD (1998) *World Investment Report 1998: Trends and Determinants*, chapter VII stated that despite the crisis, foreign investment remained positive and continued to add to the existing investment stock. Net inflows are estimated to have increased from US$ 77 billion in 1996 to US$ 80

5.4.8 Dispute Settlement under AFAS

Regarding dispute settlement, the Protocol on Dispute Settlement Mechanism for ASEAN is generally referred to and applied with respect to any disputes between member countries concerning the interpretation or application of the agreement. A specific dispute settlement mechanism may be further established. However, there is no mechanism for settling disputes between private sectors under AFAS. Compared to the NAFTA, which provides the mechanism for settling disputes between private sectors, and between private sectors and government, ASEAN does not concern itself with this issue, and leaves it open for future circumstances without referring to any further solution either relying on domestic court or arbitration or other procedures[133]. This appears to be a problematic issue in practice since private sectors and business are the main engines propelling the implementation of AFAS and indeed, disputes between them may inevitably occur in business life. So a mechanism for amicably settling such disputes is necessary.

The Institutions specified for carrying out functions to facilitate the operation of this Framework Agreement[134] is the Senior Economic Officials Meeting (SEOM), and the ASEAN Secretariat will assist SEOM in providing support for supervising, co-ordinating and reviewing the implementation of the Agreement. In practice, the ASEAN Council for Trade in service may be necessary. For instance, the Council may help promote the harmonisation of rules and regulations in the region, enhance the co-

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billion in 1997. And especially inflows of service investment to Thailand even increased ten times from the 1997. (UNCTAD, 1998: 197-242)

[133]. Even though AFAS Art. VII (2) provided that "2. A specific dispute settlement mechanism may be established for the purpose of this Framework Agreement which form an integral part of this Framework Agreement". This provision does not refer to private sectors directly. It is probably due to the fact that AFAS is a regional framework agreement and thus ASEAN countries may leave private issue to the national level. Alternatively, they may regard that Art. VII (2) is valid for further establishing a specific mechanism for settlement of private dispute.

[134]. This includes the organization of the conduct of negotiations provided under this Agreement.

operation in service trade among ASEAN countries, facilitate the process of mutual recognition in ASEAN as well as scrutinise practices of the Members.

5.5 ASEAN Framework Agreement on Intellectual Property Co-operation

The objectives of the ASEAN Framework Agreement on Intellectual Property Co-operation are to strengthen ASEAN co-operation in the field of intellectual property through an open and outward looking attitude. The co-operation extends to the private sectors and professional bodies of ASEAN. Member countries of ASEAN agreed to explore the possibility to set up an ASEAN patent and trademark system, as well as an ASEAN patent and trademark office if feasible. This aims at creating ASEAN standards and practices in the development of their intellectual property regimes to be consistent with international standards, and to enhance the promotion of technological innovation and the transfer and dissemination of technology in the region[135]. ASEAN agreed to implement intra-ASEAN intellectual property arrangements in a manner in line with the objectives, principles, and norms set out in the Agreement on TRIPS and the relevant conventions. ASEAN countries shall abide by the principle of mutual benefits in the implementation of measures or initiatives aimed at enhancing ASEAN intellectual property co-operation.

The scope of co-operation includes the field of copyright and related rights, patents, trademarks, industrial designs, geographical indications, undisclosed information and layout designs of integrated circuits. To implement the objectives of this agreement, ASEAN countries agreed to enhance intellectual property protection and enforcement, by networking of judicial authorities and intellectual property enforcement agencies, and to strengthen cross-border measures of co-operation as well as intellectual property administration. They will explore the possibility of creating an

ASEAN database for intellectual property registration, and automation to improve the administration of intellectual property. Moreover, they intend to strengthen intellectual property legislation by making a comparative study of the procedures, practices and administration of ASEAN intellectual property offices. They will exchange IP personnel and experts, network IP training facilities or centres of excellence on IP, establish a regional training institute for IP, and establish the ASEAN Intellectual Property Association membership of which will be open to all specialists in the IP field. ASEAN will provide arbitration services or other alternative dispute settlement mechanisms for the resolution of IP disputes and exchange information on IP.

The ASEAN mechanism on IP comprises representatives from member countries, with support from the Secretariat. This forum is to review the co-operative activities under the agreement by meeting on a regular basis and submitting its findings and recommendations to the ASEAN Senior Economic Officials Meeting (SEOM). Any disputes arising from differences concerning interpretation or application of the agreement are to be settled amicably between the parties. If such differences cannot be settled amicably, they shall be dealt with by the SEOM and finally by the ASEAN Economic Ministers Meeting[136]. However, the Agreement did not provide for any dispute settlement mechanism for the resolution of disputes arising between private sector entities or between private sector entities and the government.

No reservation may be made with respect to any of the provisions of this agreement. However, the agreement is stated to be without prejudice to any existing or future bilateral or multilateral agreement entered into by member countries or the national laws of each member country relating to the protection and enforcement of

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[135]. Art. I: Objectives of the ASEAN Framework Agreement on Intellectual Property Cooperation.
[136]. Art. 5: Consultations of the ASEAN Framework Agreement on Intellectual Property Co-operation.

intellectual property rights[137]. This provision weakens the agreement, and it seems to be inferior both to national laws and international agreements concluded by ASEAN countries. The agreement has no MFN provision, but ASEAN countries are in any case bound by the MFN obligation in the TRIPs agreement.

A Programme of Action was agreed for 1996-1998 to begin to implement the ASEAN Framework Agreement on IP Co-operation, through ASEAN Working Group on Intellectual Property Co-operation (AWGIPC) under the purview of SEOM. Activities in the Programme of Action include studying the feasibility of utilising the ASEANWEB for IP, setting up ASEAN electronic database on patent, design, geographical indication and trademark, facilitation of information exchange on the procedures, practices and administration among ASEAN IP offices, networking of institutes offering IP training course and exchange of personnel.

This summary of the IP agreement reflects its legal weakness. The agreement is a co-operation scheme, it is not *per se* a legal binding instrument for implementation of ASEAN harmonised regulations on IP even though the agreement aims to develop co-operation among ASEAN countries on IP laws.

In fact, the agreement is only a statement of intention of the ASEAN countries to co-operate on IP laws and enforcement and protection of IP rights. The loose form of the agreement is typical of all ASEAN agreements. There is no specific time-frame, nor any detailed provisions for implementing the agreement.

The second point is that the agreement has no priority, as it does not affect either existing or future agreements of ASEAN member countries. Furthermore, the agreement is subordinate to national law[138]. This shows the reluctance of ASEAN countries to regionalise this area of laws.

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[137]. Art. 6 of the ASEAN Framework Agreement on Intellectual Property Co-operation.
[138]. Art. 6 of the Agreement on IP co-operation.

The third point is the lack of sufficient mechanisms and institutional arrangements. The implementation of the agreement relies on temporarily set up forums, a Group of experts and a Forum of representatives of the member countries, and they report to the SEOM and the ASEAN Secretariat. There is no permanent institution or mechanism to operate and implement the agreement officially. No officials or specialists have been appointed to help facilitate the process of harmonisation or mutual recognition of the ASEAN countries' laws on IP, so it is unrealistic to expect the development of an ASEAN system of such laws or of ASEAN standards and practices on IP.

The fourth point is the lack of a dispute settlement mechanism. The agreement just relies on amicable settlement and consultation between the member countries for disputes arising from the differences in interpretation and applications of the agreements.

Therefore, ASEAN needs to elaborate more specific and detailed agreements with specified time-frames and efficient mechanisms. ASEAN needs to further strengthen its institutional and legal framework for implementing the objectives of these new agreements. The most important issue is to cultivate political will supporting regional integration. ASEAN should be more realistic than rhetorical, as it has been over the past decades. The following section and chapter will discuss patterns of regionalisation and consider the direction of ASEAN integration.

5.6 The Complementarity between ASEAN Regionalism, APEC Liberalisation, and Global Liberalisation

ASEAN regionalism is quite different from the conventional regionalism implemented elsewhere. As stated earlier and also in various studies on this issue, such as Pelkmans (1997: 199-243), ASEAN integration schemes are not about integration among ASEAN members for forming a "closed or discriminatory trading bloc", but rather a

way for ASEAN countries to co-operate to increase their international competitiveness and integration with the world. In this sense, the ultimate objective of ASEAN regionalism is to increase the region's competitive edge as a production base geared toward the global market (ASEAN Secretariat, 1995: 1). On the other hand, ASEAN integration is a means to create an enlarged regional market for attracting inflows of trade and investment. This is because the economies of scale generated by ASEAN integration have enhanced its attractiveness as an investment location or a production platform for global markets as well as the regional market. Economic integration in ASEAN is largely market driven, so ASEAN does not focus solely on the region but is also globally oriented. It is clear that AFTA, AIA, and AFAS are driven primarily by the recognition by ASEAN of the necessity to continue to sharpen its international competitiveness. Therefore, ASEAN states are integrating among themselves in order to integrate with the world, and AFTA, AIA, as well as AFAS would be a means for achieving this.

Thus, it is not surprising that the rationale of ASEAN integration is not primarily to pursue a rising share of intra-regional trade in its total trade, but rather to develop the free flow of goods and mobilisation of investment intra-ASEAN. In consequence, it facilitates a further degree of market integration so that ASEAN would be increasingly attractive as an area of trade and investment in the global economy. This is the meaning of the "Open Regionalism" approach adopted by ASEAN. Pelkmans explains the term as follows:

> "Open Regionalism means that regional economic intercourse is to be promoted if and only if it is consistent with GATT/WTO and not to the detriment of other economies" (Pelkmans, 1997: 226).

AFTA, AIA and AFAS would be major instruments to facilitate the trade and production linkage within the region and with the world through TNC networks located regionally and globally. As discussed earlier in relation to each ASEAN

scheme, liberalisation is realised regionally and internationally through liberal rules of establishment under AIA, and for commercial presence (ASEAN service provider) under AFAS, as well as the ASEAN rule of origin under AFTA that facilitates trade flows from outside into ASEAN. These new ASEAN schemes clearly facilitate and balance ASEAN regional integration and globalisation. Therefore, ASEAN integration is implemented consistently and complementarily with the WTO rules and obligations as it encourages free trade and liberalises investment at regional and international level.

In practice, even though intra-ASEAN liberalisation under AFTA, AIA, and AFAS would strengthen and enhance intra-ASEAN trade and investment, ASEAN countries are still furthering generalised liberalisation internationally. Moreover, the implementation of ASEAN integration schemes is interactive with and complementary to each other that goes beyond intra-regional integration. This can be justified, for instance, from the results of the implementation of ASEAN liberalisation in investment regimes that also contribute to the elimination of ASEAN countries' most common limitations under GATS, i.e. equity restriction. As discussed above, commercial presence of service providers in ASEAN countries is subject to the existing domestic laws that generally require foreign service suppliers to enter into joint ventures with domestic nationals with limited equity. Therefore, under investment regime liberalisation, ASEAN countries would allow a 100% foreign-owned company to freely move intra-ASEAN that directly helps promote liberalisation in service trade and FDI, not just from within, but also from outside ASEAN. This would result in phasing out ASEAN limitations on market access involving commercial presence under GATS. Since many services are intangible and non-storable, they can only be delivered to foreign market if foreign affiliates can be

established to produce and sell those services in the host countries, or if at least a right of commercial presence is granted to facilitate transactions. Therefore, ASEAN countries' liberalisation of investment regime, i.e. domestic laws on equity restriction and the opening up of industries closed to foreigners, also helps service trade liberalisation. For example, the opening up of service sectors in banking, insurance, and telecommunications in ASEAN, along with the elimination of equity restriction, would greatly help enhance liberalisation in service trade at international level because non-ASEAN service providers would be able to gain market access in ASEAN countries and also enjoy ASEAN preferences. So under AFAS and AIA, preferential treatment among ASEAN countries and generalised liberalisation would be balanced. This would also fruitfully enhance AFTA as a free trade area since the reduction in tariff and non-tariff is comprehensively implemented under the three schemes in an interactive way complementarily. In fact, ASEAN liberalisation is a training ground at the regional level before moving ASEAN towards an open multilateral trading system at the global level.

ASEAN's relationship with the Asia-Pacific Economic Co-operation (APEC) forum has also linked ASEAN economy with the Asia-Pacific region. The interdependence between the two reinforces broader and generalised liberalisation as ASEAN countries are members of APEC, and they also have commitment to implement liberalisation in trade and investment under APEC. Even though APEC focuses on unilateral action[139], concerted unilateral liberalisation has occurred, for

[139]. The APEC Committee on Trade and Investment (CTI) has developed the formulation of APEC Non-binding Investment Principles, which was adopted in the Second Leaders' Meeting in Bogor, Indonesia. This document outlines the principles for regional investment based upon liberalization and fairness that even non-APEC investors should be treated equally with APEC investors and with indigenous investors under the principle of non-discrimination and national treatment. See Kodama, 1996: 375-76, also see Davidson, 1997a: 1.

instance, in service sectors among APEC economies[140]. ASEAN member countries have actively implemented the Bogor Declaration[141] aiming at liberalising trade and investment in the region by the year 2020 for developing member countries, and 2010 for developed members. This has resulted in the resolution of ASEAN Vision 2020[142] responding to the commitment under APEC. Thus, even though the APEC commitments are non-legally binding, APEC members including ASEAN countries have "concerted unilaterally" liberalised trade and investment fruitfully. Consequently, ASEAN liberalisation in trade and investment also reinforces generalised liberalisation internationally consistently with GATT/WTO, responding to the commitment to liberalisation under APEC based on Open Regionalism. Therefore, ASEAN liberalisation is complementary and balanced with broader regional and global liberalisation.

5.7 Conclusion

The most important issue of ASEAN regionalisation is to generate a common political will of ASEAN countries to agree to the implementation of deeper integration in the region. Over three decades, ASEAN countries have preferred to have their

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[140]. PECC's Survey of impediments to Trade and Investment in the APEC Region found that most APEC economies impose few barriers on foreign providers of computer services, value added telecommunications services and tourism services. Quoted in Findlay, Christopher and Warren, Tony. "The General Agreement on Trade in Services and Developing Economies in Asia-Pacific". A report prepared for the UNESCO, May 1998. Also an analysis of the individual Action Plans of APEC member economies highlights the barriers on service trade that are to be removed unilaterally within APEC process even in the areas traditionally 'untouchable'. There has been significant action such as the pace of reform in electric power generation distribution and marketing. For instance the privatization reform in Thailand including EGAT (Electric Generation Authority of Thailand) that allows foreign investors to take part in the privatization.

[141]. The Second APEC Leaders' Meeting in Bogor, Indonesia in 1994 signed the Bogor Declaration to commit APEC members to liberalization of trade and investment that goes beyond GATT as an Open Regionalism of the Asia-Pacific. As APEC is not created as a bloc or formalized a closed regional integration, APEC members concerted unilaterally liberalize trade and investment, and non-APEC would be treated equally under the principles of nondiscrimination and national treatment. APEC's Bogor Declaration has set the target of trade and investment liberalization and binds member countries to achieving this goal in the region by the year 2010 for developed members and 2020 for developing member countries.

[142]. Hanoi Declaration of 1998, the result of the Sixth ASEAN Summit, 16th December 1998. ASEAN countries called for "a concerted of Southeast Asian Nations, outward-looking, living in peace, stability

commitment based on "consensus" and have provided loose framework-agreements with flexible practice rather than a concrete legally binding regime. This is the main obstacle to the upgrading of ASEAN regional integration, as evidenced by the modest success in economic co-operation of ASEAN in the past.

From a legal point of view, ASEAN needs to take implementation of all new schemes seriously, and institutional, legal, and administrative requirements are needed to ensure implementation. Davidson has pointed out that "As has been said, in international economic law, the economist tells us what should be done while the lawyer is left to figure out how to do it" (Davidson, 1992: 139). To construct regional economic integration is largely a problem of managing interdependence. Governments may be limited in their choices by sets of rules, procedures and principles. Even though at present, each ASEAN country is free to regulate economic transactions that take place within its boundaries, its international economic relations are governed by an international legal framework, which comprises multilateral, plurilateral and bilateral agreements. Such laws establish parameters within which international trade in goods and services and foreign investment is conducted. An international framework is necessary in order to promote increased order and predictability in international transactions. Therefore, private sector entities that participate in the ASEAN scheme need a clear rule system that ensures stability and predictability to potential investment and trade. This can take place only if ASEAN members enter into binding agreements and implement the agreed framework through domestic legislation.

The success of ASEAN in economic integration is very crucial for sustaining economic growth and development in the region. Also the success of ASEAN will

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and prosperity, bonded together in partnership in dynamic development and in a community of caring societies".

contribute to the global economy. This is evidenced by the recession of global trade in 1998 soon after the crisis took place in Asia. According to the report of World Trade Organisation: "world trade growth slowed in 1998 after unusually strong growth in 1997", the rate of growth in the volume of world merchandise exports slowed to 3.5% in 1998 from over 10% in 1997, due largely to continuing economic contraction in much of Asia"[143]. The trend of global trade reflects the interdependence of the world market and the ASEAN country economies. This further implies the need for a global regime that also encourages economic growth of regions of the world, especially the sustainability of Asia and ASEAN economic growth, which would help to contribute to the global economy, since this region's trade accounts for a quarter of global trade[144].

Finally, a new direction of ASEAN regional integration is the emergence of new approach to balance regionalism and globalisation. ASEAN has adopted "Open Regionalism" and is moving toward deeper regional integration based on a harmonious legal system and the mutual recognition principle. Open economic integration can be consistent with globalisation and the worldwide liberalisation of trade and investment, as this integration process does not create an economic bloc against non-member of the group. ASEAN has been implementing deeper economic integration in the region while opening its market to outsiders. This is a new direction of ASEAN regional integration. However, to implement Open Regionalism ASEAN

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[143]. WTO reports on 16th April 1999. The report further stated that Trade contraction in Asia has been the biggest factor in the global trade slowdown, imports into Asia fell by 8.5%. This also results in global exports of commercial services recorded the first annual decline in value terms since comprehensive statistics became available in the mid-1980s. World GDP and trade growth slowed in 1998 as the Asian crisis deepened and its repercussions were felt increasingly outside Asia (these are the countries that were most immediately affected by the financial crisis that broke in mid-1997 Indonesia, Malaysia, Philippines, the Republic of Korea and Thailand.)
See http://www.wto.org/wto/intltrad/internat.htm.

[144]. World Trade Report of WTO in April 1999. Total global trade amounted to US$ 10,635 billion and the Asian trade is recorded at US$ 2,384 billion, which is the lowest level of stagnation for the region in history.

still needs a certain level of legal and policy harmonisation or mutual recognition among ASEAN member countries. Therefore, legal and institutional frameworks for implementing "Open Regionalism" are required even though the system is not necessarily the same as the ones implemented in other regions, such as the EU.

Table 1

Summary of Most Common Limitations on Horizontal Commitments under GATS of ASEAN Countries

Limitations	Brunei	Indonesia	Malaysia	Philippines	Singapore	Thailand
Limitation on foreign ownership	x	x	x	x		x
Limitations on the type and number of foreign personnel and their duration of stay	x	x	x	x	x	x
Limitation on ownership of land		x		x		x
Requirement that domestic residents be part of board of directors	x			x		

Source: ASEAN Secretariat Discussion Paper, Sixth Meeting of the Coordinating Committee on Services, 7-9 October 1996, Jakarta, Indonesia

Table 2

GATS General Horizontal Commitments of ASEAN Member Countries: All Sectors

Brunei	Indonesia	Malaysia	Philippines	Singapore	Thailand
All Sectors	**All Sectors**	**All Sectors**	**All Sectors**	**All Sectors**	**All Sectors**
3a Unbound for measures concerning foreign equity or interests in companies established or wishing to establish a commercial presence. 3b Unbound except with respect to existing commercial presence. Half of the Board members of a public company and half the Directors of citizens of Brunei Darussalam 4a Unbound except for measures concerning the entry and temporary presence of intracorporate transferees at the level of managers, executives and specialists ab Unbound	3a Commercial presence of the foreign service provider may be in the form of joint venture and/or representative office unless otherwise provided. Joint ventures should be in the form of limited liability enterprise, and not more than 49% of the capital share can be owned by foreign partners 3b Non-resident taxpayers subject to withholding tax of 20% on interest, royalties, dividend and service fee income. No foreigners may own land. Joint ventures may hold land use and building rights 4a Only directors, managers and technical experts/advisors are allowed with a maximum stay of two years subject to one year extension. Managers and technical experts are allowed based on an economic needs test. 4b foreign nationals are subject to immigration laws and regulations, must hold a valid working permit issued by the Ministry of Manpower and are subject to national, provincial and municipal taxes.	3a Acquisition of assets or interests of Malaysian companies and businesses, mergers and take-overs require prior approval. 3b Land, property and real estate acquisition may be denied under certain circumstances (if acquisition is for speculative and non-productive purposes) Special preferences for Bumiputra companies and institutions remain unbound. Corporations in which the Government has an interest shall, in acquiring services, give first consideration to service suppliers in which the Government also has an interest. 4a Unbound except for measures affecting the entry and stay of senior managers, specialists, professionals, and business visitors.	3a Participation of foreign nationals in the governing body of any corporation expressly reserved for Philippines nationals shall be proportionate to the share of foreign capital in such enterprises. All executives and managing officers must be citizens of the Philippines. Only citizens of the Philippines or companies at least 60% owned by Philippine nationals may own land and acquire public lands through lease. 3b Foreign firms engaged in non-manufacturing activities and which are not financial institutions shall observe a 50-50 debt-to-equity ratio. 4a Non-residents may be admitted only after a determination of the non-availability of a Philippine national who is competent, able and willing to perform the services for which the non-resident is desired.	2a Temporary movement of intra-corporate transferees at the level of managers, executives and specialists is limited to three years that may be extended to two additional years 3b A foreigner registering a business firm must have a local manager who is a Singapore citizen, or permanent resident or employment pass holder. At least one director of the company must be a local resident. All branches of foreign companies registered in Singapore must have at least two local resident agents.	3a Commercial presence is permitted only through a limited liability company in which foreign equity does not exceed 49% and the number of foreign shareholders is less than half of the total. Foreign nationals or companies are not allowed to own land, but may lease land and building and are allowed to own part of condominium units. 4a Temporary movement of a natural person for the purpose of attending business meetings is limited to 90 days. Corporate transferees at the managerial, executive level or specialists are limited to a temporary stay of one year but may be extended to a further two terms of not more than one year each.

Note: 1) Cross border supply; 2) Consumption abroad; 3) Commercial presence; 4) Presence of natural Persons. a)Limitation on market access; b) Limitation on national treatment.

Source: ASEAN Secretariat Discussion Paper, Sixth Meeting of the Coordinating Committee on Services, Jakarta, Indonesia. Based on national schedules of ASEAN countries of April 1996

Table 3

GATS MFN Exemptions of ASEAN Member Countries

Brunei	Indonesia	Malaysia	Philippines	Singapore	Thailand
All Sectors Future liberalization affecting limitations on foreign equity interest in companies established in Brunei Darussalam shall be carried out in a differentiated manner. Preferences for entry and temporary stay of workers from traditional sources of supply. **Legal Services** All measures pertaining to the provision of legal services in Brunei Darussalam. **Financial Services** Treatment with respect to the granting of approval to establish offshore banks, to expand existing operations and conduct new activities in the financial services sector may be accorded in a differentiated manner on the basis of reciprocity and at the discretion of the relevant authority. **Reinsurance and Retrocession** Exception granted to ASEAN Reinsurance Corporation (ASEAN re). **Banking and other Financial Services** Subject to currency interchangeability agreement	**Banking Services** Measures relating to a joint-venture bank of national and foreign origin under which entry of foreign bank is allowed on a reciprocity basis. **Movement of Personnel (Semi-Skilled)** Low level occupations reserved for Indonesian citizens, but limited exceptions are granted to citizen of Malaysia, Singapore, Brunei Darussalam, Papua New Guinea and Australia. **Construction Services** Measures relating to preferential shortlisting in international competitive bidding (applied to ASEAN Member Countries)	**All Sectors** Liberalization of measures affecting movement of foreign semi-skilled and unskilled workers may be carried out in a differentiated manner based on reasons including proximity, religious and/or cultural compatibility. Liberalization of measures in existing or future policies limiting foreign equity or interests in companies and businesses in Malaysia shall be carried out in a preferential and differentiated manner. **All Financial Services including Insurance** Preferential treatment for the supply of financial services to Malaysians may be accorded to financial service suppliers of another country in a differentiated manner. **Advertising** 20% foreign content limitation for advertising is waived for ASEAN Member Countries.	**All Sectors** Special visa category for traders and investors of countries with which the Philippines has concluded treaties on entry rights for traders and investors: the labour market test is waived and simplified entry procedures are provided. **Liner Cargo Trade** Parties to the UNCTAD Liner Code which effectively implement the Code are assured of at least 40% share of their bilateral export and import liner cargo trade with the Philippines. **Cabotage Transport** Limited access to domestic shipping is granted to countries with which the Philippines has concluded agreements on Amity, Commerce, and Navigation. **Banking and other Financial Services** Establishment of commercial presence or expansion of existing operations in financial services in the Philippines would be granted to financial services of another member that according favourable treatment to service suppliers of Philippines.	**All Sectors** Preference for workers from traditional sources of supply. Investment guarantees protecting foreign investments from unforeseen contingencies such as nationalization, war, etc. are only accorded to co-signatories of Investment Guarantee Agreements (including ASEAN Member States). Commonwealth Tax Scheme grants relief against Singapore income tax derived from a Commonwealth country. **Legal Services** All measures pertaining to the provision of legal services in Singapore. **Broadcasting** Singapore Broadcasting Corporation accords preferential broadcast and transmission rights to selected countries with which it has signed bilateral agreements. **Computer Reservation Systems** Market access and national treatment are based on reciprocity in mutual concession (including ASEAN Member Countries) **Maritime Transport** Commitments to bind current level of market access and treatment in storage and warehousing, freight forwarding, inland trucking and container station and depot services will be through the conclusion of bilateral shipping agreements.	**Business Services** Bilateral Agreements on auditing services are based on reciprocity treatment. Publishing of newspapers will be granted to natural persons of the countries which have treaties with Thailand. **Computer Reservation System** Only airlines which in Amadeus system can bring in and install their systems in Thailand **Selling and Marketing of Air and Maritime Transport Services** Value added tax on a reciprocal basis. **International Maritime Transport of Cargo** Subject to treaties with US, Vietnam and the People's Republic of China. **International Road Transport Services** Subject to reciprocity. **Aircraft Repair and Maintenance Services** Permission granted only to airlines which treat Thai carriers on reciprocal basis **Banking and other Financial Services** Future measures affecting the supply of banking and other financial services would be accorded on a favourable basis to the service providers of countries affording favourable treatment to

with Singapore. **Radio & Television** The Radio Television Brunei Accords preferential broadcast and transmission rights to selected countries with which it has signed bilateral agreements (Singapore, Malaysia and Indonesia)				**Reinsurance and Retrocession** Exception granted to ASEAN Reinsurance Corporation. **Banking and other Financial Services** Subject to currency interchangeability agreement with Brunei. Granting of approval to establish offshore banks and expand existing operations may be accorded in a differential manner on the basis of reciprocity or at the discretion of Malaysia.	Thai service providers. **Service Sectors stipulated in Treaty of Amity and Economic Relations (US)** Only American citizens and entities are granted national treatment with respect to operating business and providing services in Thailand.

Source: ASEAN Secretariat's Information Paper: Member Country Commitments under the GATS. Document No. 8. Second Meeting of the Ad-Hoc Working Group on ASEAN Cooperation in Services, 17-19 January 1995, Makati, the Philippines.

Diagram 1

Summary of ASEAN country schedules under GATS ("X" Open, "-" not Open) Compiled from Country Schedule submitted under GATS

Service Sectors	Brunei	Indonesia	Malaysia	Mynmar	Philippines	Singapore	Thailand
Business Services	X	X	X	-	X	X	X
Communication services	X	X	X	-	X	X	X
Construction & Engineering Aservices	-	X	X	-	-	X	X
Distribution Services	-	-	-	-	-	-	X
Educational Services	-	-	-	-	-	-	X
Environmental Services	-	-	-	-	-	-	X
Financial Services	X	X	X	-	X	X	X
Health Related & Social Services	-	-	X	-	-	-	-
Tourism & Travel Related Services	-	X	X	X	X	X	X
Recreational, Culture & Sporting Services	-	-	X	-	-	-	X

Transport Services	X	X	X	X	X	X	X
Other Services	-	-	X	-	-	-	-

Table 4

Sectoral Commitments of ASEAN Countries: Banking

Brunei	Indonesia	Malaysia	Philippines	Singapore	Thailand
No sectoral commitments on acceptance of deposits, lending activity, trading in financial instruments and asset management	**Acceptance of deposits** 1a Deposits received by banks subject to government regulation. 3a &3b Foreign banks may only open new branches in selected areas. Acquisition of local banks is allowed through the purchase of up to 49% of shares in local banks. Foreign service provider must be in the form of a joint venture with locally incorporated bank. 4a Only executive positions can be filled by expatriates in foreign branches with limitation that at least one of them shall be Indonesian. For joint ventures, only directorships can be assumed by expatriates. **Trading in money market, foreign exchange, transferable securities, exchange rate and interest rate instruments, financial derivatives, and other negotiable instruments** 3a & 3b Foreign banks may only open new branches in selected areas. Acquisition of local banks is allowed through the purchase of upto 40% of shares in local banks. Foreign service provider must be in the form of a joint venture with locally incorporated	**Acceptance of deposits** 1a & 2a Soliciting, advertising and acceptance of deposits are not allowed. 3a Only permitted through existing institutions licensed as banks. **Lending of all types** 1a &2a Lending to residents in any current must be undertaken jointly with banks incorporated in Malaysia. 3b Non-resident controlled companies have to source 60% of their credit needs from Malaysian-controlled institutions. **Trading in money market, foreign exchange, transferable securities, exchange rate, and interest rate instruments, financial derivatives, and other negotiable instruments** 3a Transactions by offshore banks must be conducted in foreign currencies. Transactions for own account are limited to instruments created and issued outside Malaysia. Trading in foreign currency is not permitted except by commercial and offshore banks. Trading and dealing in financial derivatives requires establishment of a joint	**Acceptance of deposits** 1a Commercial presence is required. 3a Foreign equity in commercial banks is restricted to 30% of total shares. Deposit taking confined only to commercial banks and to the four grandfathered foreign bank branches. Prior authority is required for acceptance of deposit substitutes Participation of aliens in the Broad of Directors is limited to one third of Broad's total membership. **Trading in money market, foreign exchange, transferable securities, exchange rate and interest rate instruments, financial derivatives, and other negotiable instruments** 1a Commercial presence is required. 3a Foreign equity in commercial banks is restricted to 30% of total shares. Participation of aliens in the Board of Directors is limited to one third of Board's total membership 4b In the case of financial derivatives, foreign service suppliers shall perform	**Acceptance of deposits** 3a No new commercial banks and finance companies can be established Aggregate foreign ownership of commercial banks is restricted to 40% of total shareholding. All finance companies can only conduct Singapore dollar business. 3b Foreign banks can only operate from one office and location of banks is subject to approval. No off-premise ATMs can be established. Foreign currency savings accounts can only be operated for non-residents. There are restrictions on amount of deposits of Singapore dollars (S$250,000) per deposit from non-residents. **Trading on money market, foreign exchange, transferable securities, exchange rate and interest rate instruments, financial derivatives, and other negotiable instruments** 3a Banks are required to set up separate subsidiaries to trade financial futures. Non-bank money changers are required	**Acceptance of deposits; Lending of all type: Trading in money market, foreign exchange, transferable securities, exchange rate and interest rate instruments, financial derivatives, and other negotiable instruments; Asset management** 3a Bounds on existing foreign bank branches. ATM operations possible only within own premises or by joining ATM pools operated by Thai banks. Maximum allowable foreign equity participation in local banks is 25%. At least three fourths of local bank directors must be of Thai nationality. Not more than five international banking facilities will be allowed to undertake full branching business by 1997. 4a Limitations on the number of non-resident foreign personnel per foreign bank branch.

	bank. 4a Only executive positions can be filled by expatriates in foreign branches with limitation that at least one of them shall be Indonesian. For joint ventures, only directorships can be assumed by expatriates. **Lending of all types and asset management** 3a & 3b Foreign banks may only open new branches in selected areas. Acquisition of local banks is allowed through the purchase of up to 49% of shares of local banks. Foreign service provider must be in the form of a joint venture with locally incorporated bank. 4a Only executive positions can be filled by expatriates in foreign branches with limitation that at least one of them shall be Indonesian. For joint ventures, only directorships can be assumed by expatriates.	venture company where foreign shareholding must not exceed 30%. **Financial leasing** 1a & 2a Services must be undertaken jointly with banks incorporated in Malaysia. 3a Entry as a non-bank is limited to joint venture or office, representative Foreign Exchange. **Asset management** 3a Asset management by offshore banks is confined to non-residents and foreign currency assets. Asset management in Malaysian equities are confined to non-residents which are not offshore companies. Entry is restricted to joint venture with foreign holding not to exceed 30% of shares.	technical functions only with Filipino understudy. **Asset Management** 1a Commercial presence is required. 3a Foreign equity in commercial banks is restricted to 30% of total shares. Prior authority is required for investment management. Participation of aliens in the Board of Directors is limited to one third of Board's total membership. **Lending of all types** 1a Commercial presence is required. 3a Foreign equity in commercial banks is restricted to 30% of total shares. Participation of aliens in the Board of Directors is limited to one third of Board's total membership.	top be majority-owned by Singapore citizens. **Asset management** 3a Asset management companies must have prior approval. **Lending of all types** 3a Singapore dollar loans to non-residents require approval. 3b Offshore bank's lending in Singapore dollars should not exceed S$ 100 million in aggregate.	

Source: ASEAN Secretariat's Information Paper: Member Country Commitments under the GATS. Document No. 8. Second Meeting of the Ad-Hoc Working Group on ASEAN Cooperation in Services, 17-19 January 1995, Makati, the Philippines.

Table 5

Sectoral Commitments of ASEAN Countries: Insurance

Brunei	Indonesia	Malaysia	Philippines	Singapore	Thailand
Life insurance, including annuity, disability income, accident and health insurance services 3a Commercial presence is permitted only through insurance companies that are registered in Brunei Darussalam. **Non-life insurance including annuity, disability income, accident and health insurance services and contracts of fidelity bonds, performance body or similar contracts of guarantee** 2a Compulsory insurance of third Party Liability and Workmen's Compensation can be purchased only from insurance companies in Brunei. 3a Commercial presence is permitted only through insurance companies that are registered in Brunei Darussalam. **Reinsurance and retrocession (life and non-life)** Unbound **Insurance and intermediation comprising broking and agency services** 2a Insurance intermediation is not allowed to act for	**Life insurance** 2a Unbound except if no insurance company in Indonesia is able or willing to provide the service. 3b Higher paid up capital is required for foreign services suppliers. The measures will be eliminated by 2020. **Non-life insurance** 2a Unbound except if no insurance company in Indonesia is able or willing to provide the service. 3b Higher paid up capital is required for foreign services suppliers. The measure will be eliminated by 2020. **Reinsurance** 2a Unbound except for service supplier which meets capital requirements and has a good reputation. 3b Higher paid up capital is required for foreign service suppliers. The measure will be eliminated by 2020. **Insurance brokerage** 3a At least one of the directors in a joint venture should be Indonesian. 3b Higher paid up capital is required for foreign service suppliers. The measures will be eliminated by 2020.	**All insurance subsectors** 3a Local incorporation of existing foreign branches is required. Aggregate foreign shareholding of the parent company shall not exceed 30%. New entry is limited to equity participation in existing locally incorporated insurance company. Aggregate foreign shareholding shall not exceed 30%. Acquisition of 5 % or more of shareholding in a locally incorporated company requires approval. Acquisition of such share is limited to foreign companies subject to economic needs test, including ability to contribute to financial and economic development in Malaysia, the country of the insurance company has significant trade and investment interest in Malaysia and does not already have a significant presence in Malaysian insurance industry. An insurance company is not allowed to acquire a licensed insurance broking company or another insurance company that carries on the same class of insurance business. A person holding 5 % or more shares of an insurance company is not allowed to acquire 5% or more of the shares of another insurance company carrying	**All insurance subsectors** 3a Establishment of new insurance companies is subject to the approval of the Insurance Commission. 4a Only foreigners qualified to hold technical positions may be employed with their start not to exceed five years upon entry. Each foreigner should have at least two Filipino understudies. **Life insurance** 1a Risks located in the Philippines should be insured with companies authorized to transact business in the Philippines. 3a Subject to equity limit of 40% Membership of aliens in the Board of Directors is limited to the extent of foreign equity participation. **Non-life insurance** 1a Risks located in the Philippines should be insured with companies authorized to transact business in the Philippines. 3a Subject to equity limit of 40% Membership of aliens in the Board of Directors is limited to the extent of foreign equity participation. **Reinsurance/Retrocession** 1a &2a Priority cessions to authorized insurance/reinsurance companies. Foreign re-insurers	**Life insurance including annuity, disability income, accident and health insurance services** 3a Unbound for foreign acquisitions of equity stakes in locally owned insurance companies. Unbound for issuance of new insurance licenses and establishment of new representative offices. **Non-life insurance services including disability income, accident and health insurance and contracts of fidelity bonds, performance bonds or similar contracts of guarantee** 2a None except for compulsory insurance of third party liability and workmen's compensation can be purchased only from licensed insurance companies in Singapore. 3a Unbound for foreign acquisition of equity stakes in locally-owned insurance companies. Unbound for issuance of new insurance licenses and establishment of new representative offices. **Reinsurance and Retrocession** 3a Reinsurance companies can establish as branches or subsidiaries. Existing representatives offices must upgrade to branches or subsidiaries, subject to MAS' criteria for upgrading by 1January 1997. **Insurance intermediation comprising broking and agency services**	**Life insurance** 3a Market access limited to share acquisition of existing establishments only. Maximum foreign equity participation limited to 25 % of registered share capital. 4a Only senior managerial personnel, specialists and technical assistants with the approval of the insurance Commissioner. **Non-life insurance** 1a Unbound except for international marine, aviation and transit and all classes of reinsurance. 4a Only senior managerial personnel, specialists and technical assistants with the approval of the insurance commissioner. **Insurance Broking and agency services** 3a Foreign equity participation not to exceed 25%. 4a Only senior managerial personnel, specialists and technical assistants with the approval of the insurance commissioner.

unregistered insurers. 3a Broking for direct insurance of Brunei risks requires approval from Ministry of Finance. Broker, underwriting and insurance managers require approval.	4a Unbound except for director and technical advisor/expert. **Reinsurance brokerage** 3b Higher paid up capital is required for foreign service suppliers. The measures will be eliminated by 2020. 4a Unbound except for director and technical advisor/expert.	on the same class of insurance business.	should be represented by residents agents duly registered with the insurance commission. 3a Subject to equity limit of 40% Membership of aliens in the Board of Directors is limited to the extent of foreign equity participation.	2a Agents are not allowed to act for unregistered insurers. With the exception of reinsurance risks and risks insured by protection and indemnity clubs, brokers can only place risks outside Singapore with the approval of MAS.	

Source: ASEAN Secretariat's Information Paper: Member Country Commitments under the GATS, Document No. 8. Second Meeting of the Ad-Hoc working group on ASEAN cooperation in services 17-19 January 1995, Makati, the Philippines.

Table 6

GATS-Plus Commitments of ASEAN Countries

Countries	Air Transport	Business Services	Construction	Financial Services	Maritime Transport	Telecommunication	Tourism
Brunei	Aircraft repair & maintenance services 1a,1b,2a,2b,4a,4b	Architectural services 1a, 1b, 2a,2b	Construction and related engineering services 2a, 2b	----------	International freight transport 1a,1b,2a,2b,4a ,4b International passenger transport 1a,1b,2a,2b,4a ,4b	---------- --	----------
Indonesia	Computer reservation system services 1a, 1b, 2a, 2b	Advisory and consultative services 1a,2a,2b Engineering design services for industrial process and production 1a,2a,2b Project management services than for construction 1a,2a,2b Consultancy services related to the installation of computer hardware 1a,2a,2b Software implementation services 1a,2a,2b Interdisciplinary R&D 1a,2a,2b Technical testing and analysis and services 1a,2a,2b Services incidental of manufacturing 1a,2a,2b Maintenance and repair of equipment (not including vessel, aircraft, or other transport equipment) 1a,2a,2b	Pre-erection work at construction work 3a Construction work for building 3a Construction work for civil engineering 3a Assembly and erection of prefabricated constructions 3a Special trade construction 3a Building completion and finishing work 3a Renting services related equipment for construction or demolition of building or civil engineering works, with operator 3a	Improvement in horizontal commitments for both banking and non-banking financial services sector Allow foreign banks to open branches in three new locations: Padang, Manado, and Ambon	----------	Local services: public switched telephone services, Circuit switched telephone services, teleconferencing services. 1a,2a, 3a,3b,4a Long distance: public switched telephone services, Circuit switched telephone services, teleconference services 1a,2a,3a,3b,4a International: public switched telephone services, circuit switched telephone services, teleconferencing services, packet-switch public data network services, telex services, telegraph 1a,2a,3a,3b,4a Domestic: mobile cellular telephone services, personal mobile cellular commission services 1a,2a,3a,3b,4a Public pay phone services 1a,2a,3a,3b,4a Internet access services1a,2a,3a,3b,4a Regional and national paging	Hotel 1a,1b,2a,2b, 3a Tourist resort 1a,1b,2a,2b, 3a

						services 1a,2a,3a,3b,4a	
Laos	Computer reservation system 1a,1b,2a,2b	Architectural services 1a,2a,2b Engineering services 1a,2a,2b	Construction work for building 2a,2b Construction work for civil engineering 2a,2b	Securities broking services 2a,2b All payments and money transmission services 2a,2b	Freight transportation 1a,2a,2b,3a,3b ,4a,4b Storage and warehousing services 2a,2b	Public local telephone servicesPublic pay phone system 2a,2b Electronic message and information services 2a,2b	Hotel lodging 1a,1b,2a,2b Beverage serving services without entertainment 1a,1b,2a,2b
Malaysia	----------	Wholesale, retail trade services and direct selling business 1a,1b,2a,2b,3a,3b,4a, Engineering services 1a,2a,2b,4a,4b	Construction works 2a,2b,3a	----------	----------	Data and transmission services 1a,1b,2a,2b,3a,4b Mobile data services 1a,1b,2a,2b,3a,3b,4b Telex and telegraph services 3a,4b Basic telecommunication 1a,1b,2a,2b,3a,3b	----------
Myanmar	Aircraft repair and maintenance services 2a,2b	Market research services 1a,1b,2a,2b,3a,4a,4b Marketing management consulting services 1a,1b,2a,2b,3a,4a,4b	Assembly and erection of prefabricated constructions 1a,1b,2a,2b,3a	Foreign bank's representatives office services 3a	Vessel salvage and refloating services 1a,1b,2a,2b	Telecommunication related services and Communication equipment maintenance services 3a,3b,4a,4b	International hotel operation 1a,1b,2a,2b, 3a,3b,4a Hotel management 1a,1b,2a,2b, 3a,3b,4a,4b Tourism services1a,1b, 2a,2b,3b Theme park amusement parks2a,2b,3b 4a,4b
Philippines	Computer reservation system 3a	Architectural services 1a,2a Environmental (urban) planing services 1a,2a	Private construction project 3a	Commercial banking 1a,1b,2a,2b,3a,3b	Development of government ports 3a International	Paging services 1b,2b,3a,3b	Tourism accommodation facilities Pension house

		Landscape architectural services 1a,2a Interior (Specialty) design services 1a,2a Engineering services 1a,2a Auditing services 1a,2a			transport (passenger and freight) except cabotage transport, and government owned cargoes 1a,1b,2a,2b,3a ,3b,4b		Tourist inn apartels 2a,2b,3a,3b, 4b
Singapore	Selling and marketing of air transport 1a,1b,2a,2b	Engineering services: civil engineering, production engineering, mechanical engineering, electrical engineering, electronic engineering, aeronautical engineering, marine engineering, naval architectural engineering, industrial engineering, chemical engineering 1a,1b,2a,2b,3a,3b	Leasing or rental services concerning construction machinery and equipment services without an operator 1a,1b,2a,2b	Non-life insurance services 1a,3a Participation in issues of all kinds of securities 3a Lending of all types including consumer credit, mortgage credit, factoring and financing of commercial transaction 3a	Classification societies 2a,2b,3a,3b	Store and retrieve VAN services: electronic mail, voice mail, on-line information and database retrieval, electronic data interchange, on-line information and/or data processing 1b,2a,2b,3a,3b Store and retrieval VAN services: store and retrieve file transfer, voice information facsimile mailbox and multimedia mail box 1a,1b,2a,2b,3a,3b	Hotel management companies 1a,1b,2a,2b, 3a Travel agency and tour operator services 1a,2a, 2b,3a
Thailand	Selling and marketing of air transport products 1a,1b,2a,2b,3a Computer reservation system services 1a,1b,2a,2b,3a	Research and development on natural sciences 2a,2b,3a,3b,4b Research and development on social science and humanities 2a,2b,3a,3b, 4b Management consulting services 2a,2b,3a, 3b,4b	Pre-erection work at construction work 2a,2b,3a,3b,4b Assembly and erection of prefabricated constructions 2a,2b,3a,3b,4b Special trade construction 2a,2b,3a,3b,4b Building completion and finishing work 2a,2b,3a,3b,4b	Securities companies 1b,2a,2b,3a,3b,4b Asset management companies 1b,2a,2b,3a,3b,4b	Freight transportation 1a,1b,2a,2b Custom clearance services 2a,2b,3b	Telecommunications terminal equipment leasing services 2a,2b,3a,3b,4b Paging 1a,1b,2a,2b,3a,3b,4b Domestic VSAT 1a,1b,2a,2b,3a,3b,4b	Convention centre over 2000 participants 2a,2b,3b,4b
Vietnam	Selling and marketing of air transport services 1a,1b,2a,2b Aircraft repair and maintenance services 1b,2a,2b	Engineering services 2a,3a,3b,4a Accounting and auditing services 2a,3a,3b,4a Legal services 2a,2b,3a,3b,4a,4b Taxation services 2a,3a	Pre-erection work at construction sites 2a,3a,4a Construction work for commercial buildings 2a,3a,4a Construction work for public entertainment building 2a,3a,4a Construction work for civil	Life, accident and health insurance services 3a Non-life insurance 3a Reinsurance and retrocession 1a Services auxiliary	International freight transport less cabotage 2a2b,3a International passenger transport less cabotage	----------	Tourist resort 1a,1b,2a,2b International hotel operation 1a,1b,2a,2b

			engineering 2a,3a,4a Construction work for hotel, restaurant and similar buildings 2a,3a,4a Installation work 2a,3a,4a Building completion and finishing work 2a,3a,4a	to insurance including brokering and agency services 1a,3a Lending of all types 3a Financial leasing services 3a,3b Acceptance of deposits 3a,3b Payment and money transmission services 3a	2a,2b,3a Maritime agency services 2a,2b		

Source: Compiled by the author from ASEAN countries' commitment under GATS-Plus based on Secretariat Information Paper, 17th Meeting of the Coordinating Committee on Services, Jakarta, 28-29 September 1998, and the Annex to the Protocol to Implement the Initial and Second Package of Commitments Under the ASEAN Framework Agreement on Services.

Chapter 6

Competition Laws and Economic Integration in ASEAN

Introduction

The analyses in the previous chapters have shown that in the face of the dynamic global economy and economic crises encountered by ASEAN, these countries need to develop their regional market. To create and strengthen a single ASEAN market replacing the current separate national ASEAN markets, a regionalisation of ASEAN laws and regulations, especially relating to trade and investment, is required to facilitate the free flow of goods, capital, services, and labour for achieving such an aim. A more liberalised trade and investment regime in ASEAN will better enhance their free economies and create a more favourable trade and investment climate in the region.

Consequently, ASEAN countries need to develop effective legal systems for encouraging and overseeing increasingly competitive business activities in the region. The necessity of eliminating barriers to entry of trade and investment creates a need to provide, at a regional level, an effective protection against unfair competition[1] to govern the economic activities and transactions of those TNCs located in the ASEAN region. As more liberal trade and investment regimes are established in ASEAN countries, there is an increasing requirement for competition rules to regulate fair competition among business players, as well as to supervise their behaviour[2]. There

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[1]. As stated by UNCTAD the main objective of competition laws is "to preserve and promote competition as a means to ensure the efficient allocation of resources in an economy, resulting in the best possible choice of quality, the lowest prices and adequate supplies for consumers". UNCTAD (1996e) "Competition Policy and Legislation: Information Note 21". Note by the UNCTAD Secretariat to the Intergovernmental Group of Experts on Competition Law and Policy, UNCTAD document TD/B/RBP/INF.37, mimeo.

[2]. The liberalisation of FDI policies can lead to an increase in competition in national or regional market. See UNCTAD, 1997: chapter IV.

would be very little point in eliminating various barriers and national boundaries imposed by ASEAN countries if these governmental restraints were replaced by concentrations and other restrictive business practices as well as concerted practices among private firms (Korah, 1997a: 1). Therefore, agreements restricting competition as well as the abuse of dominant positions of market power should be controlled[3] under competition laws. This is the rationale for regional competition law for strengthening economic integration in ASEAN.

This chapter will analyse the scope and basis for a comprehensive competition law in ASEAN for implementing economic integration in the region. Section 6.1 focuses on competition law and policy as the reinforcement function of ASEAN investment regime and regulations. Since ASEAN will develop its integrated regional market, it requires a regulatory regime that can facilitate free movement of trade and investment intra-ASEAN. Competition law is compatible with "open regionalism" because it is basically neutral and non-discriminatory. Moreover, the development of a regional competition law and policy that enhances fair competition among firms doing business in the region might also provide a basis for evaluating the economic benefit to ASEAN of entry by a foreign investor on competition grounds, rather than the discriminatory criteria used in screening procedures. Therefore, ASEAN regional competition laws and policies play a multifunctional role, i.e. to encourage the free flow of trade and investment, to monitor the behaviour of firms, and to evaluate the economic role or potential dominance of extra-ASEAN TNCs in the region. A single ASEAN competition law, rather than separate competition laws in each ASEAN country, would ensure that competition is evaluated on a regional basis, thus

[3]. To control here means to check, to verify, and to vet; in substantive rules of the competition laws. It means to exercise restraint or direction on the free action of another, to command those to comply with the rules in order to keep the market open and refrain from the abuse of dominant market power.

maintaining the principle of open regionalism in ASEAN. I will discuss this topic in section 6.5.

Unlike the assumptions of neo-liberalism (Picciotto, 1998: 738)[4], competition law and policy accepts the important role of states and good governance institutions in regulating firms' behaviour. This perspective is also more compatible with the new approach of positive integration ideology (Picciotto, 1998: 739)[5]. Moreover, competition law generally takes a pro-consumer policy perspective that takes into account the public good and social welfare. This ensures that the advantages of liberalisation within ASEAN resulting from economic integration would directly contribute to the general public wealth through consumers.

Section 6.2 surveys existing ASEAN laws relating to unfair competition and considers how they function and whether they are effectively enforced. Section 6.3 focuses on the rationale for a regional ASEAN competition law. The rationale for implementing regional competition law and policies is that the removal of internal barriers should not be allowed to result in companies creating territorial exclusivity through cartels or the abuse of dominant position. Control of restrictive business practices in the process of liberalisation is a key element in the new approach to positive integration (Picciotto, 1998: 735-8). This approach is unlike neo-liberalism, which tends to assure that the free market needs no control, regulation or restriction, either by government or public bodies.

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[4]. Neo-liberalism regards regulation as an unnecessary burden; as Picciotto stated, the perspective of neo-liberal ideologues toward economic integration is that "...international integration means the creation of open markets, which requires only strong provision for the protection of property rights, the maintenance of public order, and not much else". See Picciotto, 1998: 738.

[5]. Picciotto argues that the current phase of restructuring of the global political economy needs the creation of positive linkages across regulatory regimes, to facilitate a shift from negative to positive integration. This can also be applicable to economic integration at a regional level. See Picciotto, 1998: 739.

6.1 Competition Law as a Reinforcement Function of ASEAN Investment Regime and Regulations

6.1.1 Why does ASEAN require Competition Law?

Firstly, since ASEAN aims to strengthen economic integration in the region, it needs laws and institutions to support the implementation and elaboration of trade and investment liberalisation within the ASEAN market. The interaction between government, consumers, and producers results in the concern that a rules-based system needs to be strengthened. How the competitive process actually works and to what extent the government should regulate the relationships between producers and consumers is significant. In this sense, competition law is essential as an instrument to regulate fair competition because, as I mentioned earlier, it is compatible with liberalisation since it is basically neutral and non-discriminatory.

Secondly, in an emerging ASEAN free market economy, monopolies and restrictive business practices are viewed as undesirable because they are likely to distort prices and the efficient allocation of resources. Therefore, contestability has to be realised, so that free entry and the competitive pressure of new competitors will function and balance market power and structure in the ASEAN market. The goal of market contestability and undistorted competition is to create an ultimate public benefit for the consumers, to enable great varieties of product ranges at the minimum price (UNCTAD, 1997). Competition law generally takes a pro-consumer policy perspective that fundamentally strengthens consolidation of social wealth and of general consumers.

In addition, competition law and policy enables small and medium sized enterprises to enter the market, therefore it can be implemented as an alternative to industrial policy based on strategic policy, which has been regarded as non-neutral

government intervention. Hence, competition law not only enhances consumers' interest, it also helps small and medium sized firms to compete equally with other firms in the regional economy, again while complying with the principles of liberalisation on a non-discriminatory basis. Additionally, the state still plays an important role in preventing market failure so that ASEAN countries may feel confident in their roles of monitoring the behaviour of the private sectors as they still prefer to play their part in overseeing economic transactions, and do not leave the private sectors alone to interact with each other as in neo-liberal ideology. Therefore, since ASEAN countries generally lack national competition laws (as will be discussed in section 6.2), it would be advantageous for ASEAN countries to launch an effective comprehensive competition law into the region, in parallel with the implementation of the trade and investment liberalisation process.

As regards foreign investment, the implementation of competition laws in ASEAN countries would ensure the realisation of more advantages from liberalising the entry, establishment, and operation of foreign investors, because competition laws would regulate and control mergers and acquisitions and the abuse of dominant market power in the ASEAN economy. The fear of economic conquest by powerful foreign TNCs might be better dealt with in this way rather than by the investment screening process employed by all ASEAN countries until now. The implementation of competition laws and policies in the ASEAN region could essentially help to eliminate the currently somewhat restrictive investment laws and regulations, even though actually some investment restrictions are in fact employed in almost if not all countries (Geist, 1995: 673-717)[6], not only in ASEAN. The implementation of competition laws

[6]. Geist surveyed national investment laws in 11 countries from every region of the world and found that every country, including the US and the UK, which are most liberal, employ common restriction on entry of foreign investors in specific areas that affect economy or security of the country: restricted

in ASEAN countries along similar lines to those implemented in other countries may help bring their laws into alignment with a possible future general agreement on the regulation of foreign direct investment[7].

6.1.2 The Interaction between Competition Laws and Investment Laws of ASEAN Countries

The analysis in chapter 4 showed that all ASEAN countries have employed a screening process and applied pre-entry requirements to all foreign investors. There are also some regulations to control foreign investors/firms from being a dominant firm in the economy, for instance, limitations on foreign equity/ownership, and divestment requirements. These laws and regulations can be used to prevent foreign investors from merging with or acquiring a local firm, as they cannot own shares above a specified limit[8]. Foreign firms also cannot merge with or acquire other foreign firms if their equity in the new company is beyond the equity ratio set by the laws. Obviously, under this condition, ASEAN countries need competition law to control mergers & acquisitions. Even though ASEAN countries have been relaxing some regulations concerning the equity ratio of foreign investors, this has been applied on a case-by-case basis under specific conditions. Nevertheless, these regulations do not control local firms, or prevent them from merging with or acquiring other local or foreign firms. Indeed, local companies have sometimes established a monopoly position in the market in specific sectors. For instance, in telecommunications, Chinnawat Co., Ltd., a Thai company, monopolises the Thai market in mobile phones and related products; Telecom Asia is a monopoly telephone network provider in

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industries. Geist further found that the convergence of FDI policy has led to significant similarities in the standards and procedures applied to the admission of FDI internationally. The countries surveyed have adopted general policies of permitting FDI subject to certain exceptions. The almost uniform uses of a notification and/or prior approval procedure are widely used.

[7]. Geist, 1995: part III the framework for a General Agreement on the regulation of foreign direct investment.

Thailand, and Sammart Telecom Co. Ltd is the only provider of satellite dishes.

ASEAN countries also reserve some business sectors and exclude foreign investors from investing in those specific fields of business. But all these laws and regulations have to be phased out. All industries will be opened for investment to ASEAN investors by 2010 and to all investors by 2020 subject to some exceptions, as discussed in chapter 5 above. Therefore, if ASEAN countries liberalise their investment regimes, they may be concerned that they are moving from a system of screening all takeovers by foreign firms of national firms to screening none. They may see risks of foreign firms acquiring dominant positions. To replace these investment laws by competition laws may not only prove to be more effective than the screening process, but also a more efficient way to assess the competitive effects of foreign firms at the time of entry and after entry.

Competition laws and policies thus have a major role to play in the process of ASEAN liberalisation. This is also to ensure that the ASEAN market is kept as open as possible to new entrants, and that firms do not frustrate this by engaging in anti-competitive practices. In this manner, the vigorous enforcement of ASEAN competition law can provide a reassurance that investment liberalisation will not leave the government powerless against anti-competitive transactions or subsequent problems.

Competition laws may replace the restrictive investment laws and regulations, with principles based on non-discrimination in the control of restrictive business practices among firms, regardless of the origin or the nationality of enterprises. Competition laws normally apply to all firms operating in given national or regional

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[8]. Generally foreign ownership or share equity cannot excess 49% of the total share, except in the case that the company is granted promoted status under promotion scheme.

territories, whether through domestic sales, imports, affiliates or non-equity forms of foreign direct investment. They do not, in principle, discriminate between national and foreign firms, or between firms from different national origins. In this manner, competition law monitors the competitive behaviour of TNCs having effects in host ASEAN countries. This is to ensure that all firms do not abuse dominant market power, and to prevent inefficiencies stemming from market allocation agreements which might lessen trade and investment. Therefore, competition law strengthens the principle of national treatment and enhances investment liberalisation, to comply with the objectives of the ASEAN investment area and economic integration in ASEAN.

Now I will assess the existing ASEAN laws relating to unfair competition, to consider to what extent ASEAN needs a comprehensive competition law at a regional level and in what respect competition law could replace the current foreign investment laws in ASEAN countries.

6.2 Survey of ASEAN Laws Relating to Unfair Competition

Currently, ASEAN countries do not have systematic competition laws and policies. Some ASEAN countries do have some elements of anti-trust law or anti- monopoly laws. In this section, I attempt to survey, country by country, the ASEAN laws relating to unfair competition and to analyse whether those laws are effectively enforced to control anti-competitive business practices.

In Indonesia, there are no laws relating to unfair competition, monopolisation, or passing off which may affect rights in relation to industrial property in this country (this was probably due to the Soeharto regime during which the majority of business was under the control of and owned by the Soeharto family). Currently, unfair competition is controlled under Art. 1365 of *the Civil Code*, which provides that a

wrongdoer whose conduct injures other people is obliged to pay compensation, and under article 382 bis of *the Criminal Code:*

> Art. 382 bis of the criminal Code provides that: "Anyone who deceives the public or someone else with a purpose to obtain, maintain or add to his own benefit or that of his or another person's company, will be punished because of his unfair competition, with imprisonment for a maximum 16 months or fine of a maximum nine hundred rupiahs, if such acts injure his competitors or another competitor who competes with his competitor".

However, the penalty recorded here is plainly ineffective: a fine of 900 Rupiahs is approximately 0.07 pounds, which really means nothing for a dominant company, and the imprisonment sentence of 16 months is inappropriate and unrealistic. Especially, the compensation under Civil Code is not clearly defined so it can be minimal because the firms that committed the offence can exercise their powerful influence on the courts concerned.

In Malaysia, there are no specific laws against unfair trading practices. There are piecemeal provisions in particular statutes such as *The Hire Purchase Act 1967*, *The Price Control Act* 1946, and *The Control of Supply Act 1961* that provide some limited protection to the consumer in specific situations or transactions. In particular, Sec. 28 of the Malaysian *Contract Act 1950* renders all covenants in restraint of trade void. However, there is no criterion for judging whether the covenants in question are reasonable, or if they are harsh or onerous or too wide. Apart from the above restriction, there are no controls or regulations over contracts relating to exclusive dealing, monopolisation, franchises or resale price maintenance. Where mergers are concerned, there are various requirements to be complied with in takeover and mergers, but these relate to the regulation of the shareholdings of a corporation in Malaysia. Section 179 of the *Companies Act 1965* prescribes a panel on Takeovers and Mergers to provide guidelines on the acquisition, takeover and merger of a company. There is no significant imposition of fines or punishment on the firms

involved in unfair competition. Contracts dealing with these types of conduct, insofar as they do not infringe any of the specific laws mentioned, are valid and enforceable. It is notable that Malaysian laws on takeover and mergers do not apply to contracts made or performed outside Malaysia unless the contract expressly states that the laws in Malaysia will apply (CCH Asia Limited, 1998).

However, these Malaysian laws relating to unfair competition are obviously not systematically enforced and might inadequately deal with anti-competitive business practices of modern global firms, since these laws are very old and fragmented. They also do not apply to contracts made or performed outside Malaysia that might have an effect on market structure or power within the Malaysian economy and injure other competitors. Moreover, there are no controls or regulations over contract relating to exclusive dealings, monopolisation, franchises and price fixing. So there is no doubt that existing laws would ineffectively and inadequately control restrictive business practices of firms if they occurred as a result of the increasing competition among firms operating in ASEAN flowing from liberalisation.

In the Philippines, there are some laws regulating or prohibiting monopolies and restraint of trade or unfair competition. *The Philippines 1987 Constitution* provides that "the State shall regulate or prohibit monopolies when the public interest so requires, no combinations in restraint of trade or unfair competition shall be allowed"[9]. There are also other general and special laws that prohibit and provide for the consequences of acts in restraint of trade. In particular, Art. 186 of *The Revised Penal Code* punishes monopolies and combinations in restraint of trade:

The revised Penal Code imposes a penalty of imprisonment or a fine or both upon:

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[9]. Sec. 29 Art. XIII of the Constitution.

- Any person who enter into any contract or agreement, or takes part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce or to prevent by artificial means free competition in the market.
- Any person who monopolises any merchandise or object of trade or commerce, or combines with any other person or persons to monopolise that merchandise or object in order to alter price by spreading false rumour or making use of any other artifice to restrain free competition in the market.
- Any person who, being a manufacturer, producer, processor of any merchandise or object of commerce from any foreign country, either as principal or agent, wholesaler or retailer, combines, conspires, or agrees in any manner with any person likewise engaged in the manufacture, production, processing, assembling or importation of such merchandise or object of commerce or with any other persons not so similarly engaged for the purpose of making transactions prejudicial to lawful commerce, or of increasing the market price in any part of the Philippines, of any such merchandise or object of commerce manufactured, produced, processed, assembled in or imported into the Philippines, or of any article in the manufacture of which such manufactured, produced, processed, assembled, or imported merchandised or object of commerce is used.

If the offence affects any food substance, motor fuel or lubricants or other articles of prime necessity, the maximum penalty will be imposed. In addition, the object of any of the above contacts will be subject to forfeiture by the government. When the offence is committed by a corporation, the directors or managers of the corporation of the agent or representative in the Philippines, in the case of a foreign corporation, who knowingly permitted or failed to prevent the commission of such offences, will be held liable as principals.

The Penal Code gives a right of action to any person who suffers damage as a result of any act by any person involving unfair competition in agricultural, industrial or commercial enterprises or in labour, through the use of intimidation, force, deceit, machination or any other unjust, oppressive or highhanded method. Art. 188 of the Code punishes the substitution and alteration of marks and trade names, and Art. 189 of the Code provides criminal sanctions for unfair competition; fraudulent registration of marks or trade names; fraudulent designation of origin; and false description. Furthermore, Secs. 29 and 30 of *the Trademark Law* provides civil remedies against unfair competition, false designation of origin and false description. Also *The Business Names Law Act*[10] punishes certain acts where no proper registration of the firm or business name or style is effected with the Department of Trade or Industry. The *Republic Act No. 623 (1951)* prohibits certain acts if performed without the

[10]. Act No. 3883 (1931).

written consent of the manufacturers, bottlers, or sellers of duly stamped or marked bottles, boxes, kegs, barrels and other similar containers.

There are also special laws that regulate monopolies. Among them is *Press Decree No. 576-A*, which prohibits the ownership by one person or corporation of more than one radio or television station in one municipality or city, or of more than five AM and five FM radio stations or of more than five television stations in the country. Any violation is punishable by imprisonment or a fine or both, and will result in the cancellation of the franchise and the confiscation of the station and its facilities without compensation. *The Price Act 1992 (Republic Act No. 7581)* imposes a penalty of imprisonment and a fine upon persons habitually engaged in the production, manufacture, importation, storage, transport, distribution, sale or other methods of disposition of goods, who shall organise a cartel[11]. When a violation is committed by a corporation, its officials or employees, or in the case of a foreign corporation or association, its agent or representative in the Philippines who is responsible for the violation, shall be held liable. Alien offenders shall, upon conviction and after service of sentence, be immediately deported without need for any further proceedings.

The Philippines laws, even though there are several relating to unfair competition, mainly focus on trade, and do not cover investment. There is no regulation of mergers and acquisitions. Most laws do not clearly stipulate the amount of a fine or compensation in cases where competitors are injured. There are no criteria to justify the behaviour of firms, which might be regarded as unfair competition, and

[11]. The Price Act defines a cartel as a combination of or agreement between two or more persons engaged in the production, manufacture, processing, storage, supply, distribution, marketing, sale or disposition of any basic necessity or prime commodity designed to artificially and unreasonably increase or manipulate its price. There shall be *prima facie* evidence of engaging in a cartel whenever two or more persons or business enterprises, competing for the same market and dealing in the same basic necessity or prime commodity, perform uniform or complementary acts among themselves which tend to bring about artificial and unreasonable increase in the price of any basic necessity or prime

there is no measure to assess how the public interest would be affected. Also there is no clear procedure provided in the Philippines law for dealing with firms involved in unfair competition. Therefore, the existing laws are inadequate to cope with the problems that may occur when the ASEAN Investment Area is implemented.

In Singapore there is *The Multi-Level Marketing and Pyramid Selling Prohibition Act.* This Act makes it an offence for any person to promote or participate in a multi-level marketing scheme, which essentially embraces schemes, or arrangements, which recruit participants in pyramid selling on the chain-letter principle. However, apart from this, there is no Anti-competition law in Singapore. Its open economy and liberalised investment regime have been considered sufficient to guarantee free competition in Singapore.

In Thailand, there is *The Prescription of Prices of Goods and Anti-Monopoly Act of 1979,* and *The Investment Promotion Act 1977* that includes a guarantee against state competition, against competition by state monopolies selling or dealing in similar products, against price control by the state, against export restriction, and against importation by the state or its agencies and enterprises. However, the practice of imposition of import bans on competing products to protect the activities of the promoted enterprise counteracts the guarantee of fair competition in this case. This is an example of the ineffective implementation of unsystematic competition rules.

All ASEAN countries also have Anti-Dumping laws and a Consumer Protection Law. But none of them has a systematic competition law that could regulate the rivalries of firms and control the potential restrictive business practices of producers in global networks. It is important that ASEAN countries should introduce a

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commodity or when they simultaneously and unreasonably increase prices on their competing products thereby lessening competition among themselves.

comprehensive regime of investment liberalisation, deregulation, privatisation and competition law enforcement rather than only relaxing laws on the spot and lifting barriers item by item, which is not effective and is likely to confuse foreign investors. Foreign investors usually feel burdened by tons of laws and regulations that sometimes counteract each other. Regulatory differences in the investment field are obstacles to foreign investors (Trisciuzzi, 1983)[12]. Consequently, comprehensive regionalisation of competition laws could effectively enhance the favourable legal environment for attracting foreign investors (Geist, 1995; Baker & Holmes, 1991: 30)[13].

6.2.1 Merger Regulations for Replacing Regulations on Restriction of Foreign Equity in ASEAN Investment Laws

In this section I propose to focus on merger control in ASEAN. Even though a comprehensive regional system of merger control does not yet exist, it is in the interests of ASEAN to establish merger control in the region. Since ASEAN will have to implement national treatment in the near future and eliminate investment laws, which are incompatible with the objectives of the ASEAN Investment Area (see chapter 5), merger regulations are needed to replace those laws used to function as a screening instrument. This is to ensure that there would be no emergence of cartels, trusts, oligopolies, concentrations or dominant market positions to harm the ASEAN economy, when the screening process and regulations of ASEAN investment laws are eliminated.

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[12]. Trisciuzzi (1983) says: "Perhaps the most important potential benefit would be the harmonisation of currently diverse systems of national laws and regulations. For example, harmonisation could reduce the high costs borne by multinational corporations in dealing with widely divergent regulatory regimes in different countries".

[13]. Geist (1995) pointed out that it is not surprising to find that investors encounter and become discouraged with the potentially confusing and time-consuming regulations established by individual states. Also Professor Mark Baker noted in a 1991 review of Latin American FDI codes that "the greatest disincentive to direct foreign investment was dealing with local authorities. Foreign investors do not like to deal with foreign authorities because their application and approval procedures are unclear and cause substantial delays", see Baker &Holmes, 1991: 30.

One of the main restrictions on foreign investment found in all ASEAN countries' investment laws and regulations is the limitation of foreign investors' share or equity in a company established in these countries. One rationale for limiting foreign equity in a firm established in these countries is to ensure that foreign investors can not dominate the market and abuse their market power. A foreign company also cannot merge with or acquire another local or foreign firms, since its equity will exceed the specified legal limit. But this kind of restrictive investment law has been regarded as being discriminatory and impeding foreign investors. Moreover, it has resulted in negative effects in ASEAN countries' economy. For instance foreign investors cannot generally hold more than 49% of shares in a company located in ASEAN countries, except in a particular case where the company has been promoted under a promotion scheme or is entitled to a specific status, such as pioneer status. Therefore, the majority of shares are held by domestic investors who have to seek capital by various methods. They mostly turn to loans and because domestic loans incur very high interest due to the financial policy of ASEAN governments to encourage domestic saving, they turn to offshore loans. Ironically, the inflow of capital in this case is short-term foreign debt instead of an inflow of direct foreign investment. Consequently, the more foreign investment projects take place in ASEAN countries, especially with a huge capital fund project, the more offshore loans increase. This is an example of the negative impact of wrong policies implemented in ASEAN countries, where at first, each policy seems good but the way they interact with each other eventually results in a negative impact on the overall economy. In my view this can be regarded as one of the important causes of the Asian financial crisis.

Moreover, merger regulations are also needed to control the abuse of a dominant position by domestic companies that nowadays does occur in ASEAN countries. Therefore all firms, whether domestic or foreign, would be subject to the same regulations and control, so complying with the national treatment principle and the implementation of the ASEAN Investment Area.

6.3 Rationale for a Regional ASEAN Competition Law

The removal of internal barriers among ASEAN countries to implement regional economic integration should not be allowed to result in companies creating territorial protection through cartels as well as the abuse of dominant position. While investment liberalisation in ASEAN can help promote the free entry of firms, and enhance the contestability of the ASEAN market, it is not a sufficient progress; competition laws become necessary to ensure that former statutory obstacles to contestability are not replaced by anti-competitive practices of firms, thus negating the benefits that might arise from liberalisation. The reduction of barriers to FDI in ASEAN and the establishment of positive standards of treatment for TNCs need to go hand in hand with the adoption of measures aimed at ensuring the proper functioning of the market, and measures to control anti-competitive practices by firms. The 1997 World Investment Report suggested that:

> "The culture of FDI liberalisation that has grown world-wide and has become pervasive, needs to be complemented by an equally world-wide and pervasive culture of competition, which needs to recognise competing objectives" (UNCTAD, 1997).

This statement could be truly applied to the ASEAN practical regulatory regime. Now I will discuss anti-competitive business practices that may occur among the international firms and to deal with the substance of competition laws designed to effectively regulate those unfair practices.

6.3.1 Anti-Competitive Business Practice and Substance of Competition Laws in ASEAN

Anti-competitive business practices that generally occur among international firms, and hence may also happen in ASEAN countries, include the following[14]:

1) Horizontal restraints or the hard-core cartels among firms in an oligopolistic market, engaging, for example, in price fixing, output restrictions, market division, customer allocation, and collusive tendering and other anti-competitive co-operation between firms selling competing products. All these business practices distort prices and the allocation of resources as well as resulting in a dysfunctional market that causes consumer disadvantages[15]. Fair competition would exist if no single supplier or consumer could influence the market price. Competition laws and policy may play an important role not only in prohibiting the formation of cartels but also in balancing the competitive effects of each firm in the market.

2) Vertical restraints or distribution strategies between manufacturers, suppliers or distributors, such as: tying the sale of one good as a condition for the purchase of another good; exclusive dealing (the seller requires the buyer to purchase the products only from the seller); territorial restraints (the seller requires the buyer/distributor to resell the product within a limited geographical area); and resale price maintenance (the seller requires the buyer to resell the product only at a specified price). Resale price-fixing also tends to be generally prohibited. The pro- and anti- competitive effects of such vertical restraints need to be evaluated and where necessary controlled.

3) Abuse of intellectual property rights (IPR), for example where technology-licensing arrangements abuse the monopoly position of IPR holders, such as through non-competition clauses and the so-called 'grantback'. This means the licensee is required to assign inventions made in the course of working on the transferred technology back to the licensor. Another aspect of IPR abuse, "non-contestation clauses", is that the licensee is prevented from contesting the validity of the IPR or other right of the licensor. IPR abuses might be subject to general competition rules on horizontal and vertical restraints.

4) Abuse of market dominance: dominant firms accounting for a significant market share may attempt to monopolise a market, for instance through excess prices, price discrimination, predatory low prices, refusal to deal, or vertical restraints. Rules against the abuse of a dominant position may be conduct-oriented, in other words, a general prohibition against monopolising and foreclosure of competition. Another approach is result-oriented, with a prohibition for example of predatory pricing only if the losses can be recouped.

5) Mergers and acquisition policies, where horizontal, vertical or conglomerate mergers, may reduce competition or decrease efficiency. Merger policies may be designed to ensure the contestability of markets by preventing monopoly or price-setting by a single seller and price-taking by a single buyer, as well as oligopolistic or monopolised market power. On the other hand, acquisition policies also overlap with industrial policy instruments.

6) Public undertakings and enterprises with special privileges, which are not required to behave according to market principles, (Art. XVII of the GATT and Art. 90 of the EC Treaty) in view of their market power or financial independence. This includes firms with exclusive trading rights and monopolies.

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[14] Compiled from various sources: UNCTAD, 1997; Petersman, E.U., 1993, 1996a; Schoenbaum, Thomas J., 1996.

[15]. If market prices are distorted either through cartels or monopolies, they are likely to distort also the allocation, co-ordination and distribution functions of market competition so that consumer welfare will be reduced by higher prices, fewer products and less freedom of choice.

In the new era, ASEAN countries do need to regulate these anti-competitive business practices to attain fair competition conditions. However, what ASEAN countries have to be aware of is the balance of market failure and government failure. If governments intervene so as to correct market failure or supply public goods, the risk of market failure has to be weighed against the risk of alternative government failure, because government intervention may lead to additional distortions. Therefore, fair competition conditions require rational behaviour of market participants or firms, perfect information, perfect mobility of the market, stable preferences and technologies, and reflection of all costs in the prices of good and services (Petersman, 1996a). All these requirements need a comprehensive set of competition laws and regulations among ASEAN countries. Current national laws and policy on restrictive business practices differ among these countries and the law focuses on different aspects such as anti-monopoly, anti-dumping, protection against state competition, etc. As seen in the previous section, there are no systematic competition laws in ASEAN countries. For instance, Singapore has refrained from adopting competition laws on the grounds that its liberal trade policies and its rather liberal investment regime are a significant guarantee of the contestability of its open economy. But now ASEAN countries need to introduce comprehensive competition laws and policies, and enforce them effectively. In fact, the general infrastructure and other economic comparative advantages of ASEAN countries still appear good; the only important thing that ASEAN countries lack is good governance and a rule-based system. Therefore, the combination of a sound ASEAN legal and economic systems can be viewed as favourable created factor endowments[16] that can affect ASEAN's competitiveness positively in the international trade and investment sphere.

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[16]. International competition among firms is influenced not only by "natural" production factor

6.4 The Bases of ASEAN Regional Competition Law

In the modern globally integrated world economy it is not only private enterprises but also governments that engage in competition (Porter, 1990). In ASEAN countries in particular they have widely implemented strategic policies in the trade and investment sphere (see chapter 1). In this respect, government plays an important role, as Petersman (1993: 35) pointed out:

> "By means of industrial policies aimed at enhancing economies of scale and positive externalities of national industries, strategic trade policies aimed at shifting rents away from foreign to domestic industries, or by means of investment policies designed to attract scarce foreign capital through tax incentives and favourable investment conditions."

Therefore markets are imperfect in many ways. Two different kinds of competition laws are thus required. The one is competition law for private restraints of competition and market failures, which are abuses of market power, externalities and asymmetries in information. The second is competition law for governments so as to limit government failures, which may affect the supply of public goods and created endowments/comparative advantages.

Fair competition should aim to protect less-organised firms, such as small and medium firms, in entering the market while protecting public interest and consumers in a liberal economy. Competition rules may need to be evaluated to determine how far or to what extent competition rules should regulate the behaviour of firms. For instance, in some business areas merged lines of business or operators might provide more adequate and effective operation, more varieties of products, more available services, including advanced research and technological development that individual

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endowments, but also by government-determined conditions of competition as discussed the "created" and "natural" endowments in chapter 3.

separate smaller firms/operators are unable to undertake[17]. Therefore there is a concern that competition rules may be applied so as to protect smaller firms at the expense of larger, irrespective of efficiency. It is a very difficult decision whether collaboration or competition in a particular market leads to a better use of resources. While competition is desirable in lessening economic power, businessmen believe that in some industries resources are put to better use if competition is limited. Therefore collaboration or natural monopolies may sometimes occur responding to the achievement of economies of scale. For instance, if a firm has merely expanded its plant in good time to meet an expected increase in demand, so that it is unprofitable for other firms to enter the industry, there is no objection to its monopoly (Korah, 1968: 64)[18]. Many markets can be supplied only after considerable capital investment is made or technology developed.

On the other hand, if capital requirements are a hindrance to the entry of small and medium firms into the market and one goal of competition is to enable small firms to compete in the market, then entry barriers exist on the ground of financial constraint. Hence there are not barriers to the entry of an equally efficient firm in this case where a huge investment is required, but obviously small and medium firms are unable to compete with bigger firms. Is this regarded as unfair competition? Therefore the evaluation of whether there is unfair competition requires the consideration of the public good: an enhanced distribution system, provision of goods and services, reduced cost of operation, a technological lead or reduced capital requirements of those fields of business considered. It is noted that a small firm protected only for such

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[17]. For instance if a single plant or a merged enterprise that can process all the spent nuclear fuel in the region substantially more cheaply than could smaller plants, it would be unprofitable for a second firm to establish a smaller plant. Also see the fact in KEWA (1976) Cc.M.L.R.D15.

[18]. Korah, 1968: 64, she also concluded that "it is so much cheaper to produce a product in a large plant that can be continuously used than in many smaller ones, that one or two plants of the minimum

reasons is not in a position to hold its customers or suppliers to ransom except in the short term (Korah, 1997a). Therefore to control the conduct of firms with such fragile protection of small firms may discourage large firms from making investments to enable them to compete aggressively. This implies that regulation of restrictive business practice is not only to ensure fair competition, but also to maximise the public good and sound resource management.

There is a dichotomy between market function and government role that lies at the heart of competition law. On the one hand, a liberal law of the market implies that it needs no barriers, no intervention, and no control, and that the market should be left to itself to function based on the rule of supply and demand. On the other hand, fair competition means that there should be no dominant enterprise, restrictive business practices, predatory pricing, or mergers and acquisitions that impede competition. All these behaviours may need regulatory control through competition laws to adjust the behaviour of firms. However, if there is absolute freedom from constraints, or in other words there is no regulation at all for fair competition, dominant firms could conquer the market so no one can compete. Hence, the proposed criteria for regulating the behaviours of firms may need to consider the type of business, size of business, competitive position, range or category of firms that the same level of undertakings may be treated fairly under the same conditions, rules and laws as well as the economic environment.

International competition laws for the private sector have actually been developed in various previous attempts, such as part of the 1948 Havana Charter for an International Trade Organisation, the UN Codes of Conduct and the OECD Decisions and Guidelines (Petersman, 1992: 627), The Set of Multilaterally Agreed

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efficient size can supply the expected demand and there is room for only one or two suppliers".

Equitable Principles and Rules for the Control of Restrictive Business Practices[19], and the Resolution adopted by the Conference Strengthening the Implementation of the Set [20]. However, these are "soft-law rules" rather than international/multilateral treaty law. Their aim generally is to avoid mutually harmful competition policy conflicts[21] and overcome the vision gaps and jurisdictional gaps between national competition laws (Petersman, 1993: 37). The reasons for regulatory differences in competition laws and the decentralised administration of competition policies are mainly due to the particularity of national conditions. For instance, the final decision on whether the costs of restraints of competition may be outweighed by economies of scale and by positive externalities will require case-by-case analysis with due regard to that particular national condition. Conflicts between national regulations can also entail market access barriers, market distortions and harmful international externalities.

Since there is no single agreed set of competition laws available at the moment and not even a competition law model, ASEAN countries need to develop a regional consensus on this issue. They can also refer to general basic rules of conduct

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[19]. Source: United Nations Conference on Trade and Development (1981). "*The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practice*" United Nations Document TD/RBP/CONF/10/Rev.1 New York, United Nations. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was adopted by the United Nations General Assembly at its thirty-fifth session on 5th December 1980 by its resolution 35/36. The Second United Nations Conference to Review all Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was held in Geneva from 26th November to 7th December 1990. That Conference adopted a resolution on "Strengthening the implementation of the Set" at its sixth meeting on 7th December 1990. A third review Conference took place on 13th-21st November 1995. This Conference adopted a resolution calling for a number of concrete actions to give effect to the implementation of the Set. The Set of Principles and Rules was also adopted by United Nations Conference on Restrictive Business Practices as an annex to its resolution of 22nd April 1980.

[20]. Source: United Nations Conference on Trade and Development (1991). "*Resolution Adopted by the Conference Strengthening the Implementation of the Set*". Report of the Second United Nations Conference to Review all Aspects of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practice. United Nations document TD/RBP/CONF.3/9. Geneva, United Nations, Annex, pp. 48-51.

[21]. Since the over two hundred international sovereign states have differing resources, preferences, comparative advantages, political system, and regulatory system, the national competition laws also differ in many respects such as exclusion of regulated sectors, exemption of exporters, rule-of-reason

established in those various codes/guidelines that have common features. However, the main aim of a regional competition law for ASEAN could be to facilitate the development of a strengthened regional market, as envisaged in the 1998 agreements setting up AIA, AFAS and AFTA.

6.5 Regional competition law and policy and open regionalism

The development of an ASEAN regional competition law and policy would be a new approach in this region, and even national competition law in each individual ASEAN country has not yet effectively and efficiently developed. Hence, a regional law can be justified from the inadequacy of the national competition law of the ASEAN members as discussed in section 6.2 above. I will not discuss here in detail the contents of a regional competition policy *per se,* as it is beyond the scope of this thesis. But I will discuss here the link between an ASEAN regional competition law and the concept of open regionalism.

I have already pointed out the functions of a feasible ASEAN regional competition law and policy (see introduction) that should include:

> (1) to facilitate the liberalisation of trade and investment in ASEAN;
> (2) to enhance free and fair competition among firms in ASEAN by monitoring behaviour of firms engaging business in the region, and;
> (3) to ensure a proper competitive balance between intra- and extra-ASEAN business enterprises.

These three functions of a feasible ASEAN regional competition law and policy will play an important part in facilitating ASEAN open regionalism. It will, firstly, ensure that ASEAN keeps its regional market open for both intra- and extra- regional trade and investment (the first two functions). These have been discussed above in sections 6.1, 6.2.1, 6.3 and 6.4. The third function is fundamental to open regionalism, to ensure a proper competitive balance between intra- and extra- ASEAN firms.

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exceptions, focus on corporate conduct or market structures, support of "crisis cartels" and small

Competition law and policy should help promote the growth of small and medium enterprises[22]. The liberalisation of trade and investment based on fair competition grounds will enable local small and medium firms to develop their economic strength, upgrade their technological production processes, and improve managerial systems and commercial skills, in order to compete with the foreign firms. Competition law will ensure that firms, local or foreign, cannot engage in restrictive business practices, abuse a dominant position, or form a cartel or any form of unfair practice that might damage other firms. Therefore, under such fair competition circumstances every firm either small or large can compete with each other in their relative market, size and field of business. Furthermore, competition law would permit ASEAN countries to evaluate the economic benefit from the influx of foreign firms, on the basis of whether they will damage local small and medium firms, so that they could employ competition policy in protecting local firms. This can be done through, for example, a merger control regulation so that TNCs cannot merge or acquire another company to create or strengthen their commercial dominance in the market. This would encourage foreign investment to be made on a "green field" basis that can contribute to the regional economy, ensuring that it competes with other firms (local or foreign) on the same fair basic grounds and conditions.

Since there are many small and medium firms in ASEAN countries, and these firms fear that an ASEAN regional market open to powerful TNCs might significantly affect local smaller firms, to protect the competitive position of such local companies and to ensure fair competition will increase their confidence in doing business in the

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businesses, actual enforcement and judicial review of the "law on the books".

[22] See Whish, Richard and Sulfrin, Brenda (1993) *Competition Law.* 3rd edition London/Edinburgh: Butterworths.

single ASEAN open market[23]. A regional competition law and policy could fulfil this task.

Competition law could also allow each country to protect its indigenous enterprises or national/cultural industries to preserve country specific values or to maintain the country's specific renown for its own competitiveness globally[24]. In the Czech Beer Case, the American firm, Anheuser-Busch, brewer of the American Budweiser lager beer, wanted to acquire a stake in Czech Budvar, famous for Budweiser Budvar lager beer, so far unsuccessfully. Both companies produce the same brand name of "Budweiser" beer and they have had disagreement over the brand name, but neither of them have exclusive right to use the brand name internationally, so they settled the dispute by allocating the use of the name in different markets[25]. However, a conflict occurred when they both entered the European markets, where the agreement did not clearly define the territory of the use of the name by each party. The American firm thus wanted to merge the two companies so that it could produce and sell the product world-wide without any constraint. However, Czech Budvar has been regarded as the distinct producer of the real Czech Budweiser lager beer, and the consumers, both within the Czech Republic and in other countries, favour this typical and unique beer, and prefer the Budweiser beer to be originally produced by Czech

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[23] In fact, ASEAN countries have been aware of this sensitive issue and have already promoted the small and medium firms in the region preparing them to be ready in competing with extra-ASEAN firms. See Joint Statement on East Asia Co-operation, 28 November 1999, Manila, The Philippines. Also each individual ASEAN country has set up Small and Medium Firm Networks to promote and strengthen S&M enterprises, for example, Malaysia set up the Small and Medium Industry Development Office, The Philippines set up the Bureau of Small and Medium Business Development to help promote S&M enterprises.

[24] See Muchlinski, P. T. "A Case of Czech Beer: Competition and Competitiveness in the Transitional Economies" (1996) *The Modern Law Review.* Vol. 59: 5 (September), pp. 658-675.

[25] The dispute was settled by the agreement of 4 September 1911, whereby the US brewer was granted exclusive use of "Budweiser" name in North America, while the Czech brewer was granted the name for the rest of the world. But it did not confer any right or imposed any restrictions on any part with the regard to the use of the name in Europe, nor did it prevent any party from establishing an exclusive right to use the Busweiser trade name as part of its trading style in any European country.

Budvar. They wanted to preserve Czech Budvar as the national indigenous industry and had active movements and campaigns to stop the acquisition by the American firm.

Muchlinski argued, in relation to this case, that since the Czech Republic, the only one among the transitional economies, has abolished specialised foreign investment laws and has actively liberalised investment, only privatisation and competition law could act as vehicles for the close screening of foreign investment. The EU law as a source of principles for the regulation of foreign investment would also be justified, because the Czech Republic and the EU have had an agreement[26] to bring the Czech's commercial and economic laws into line with EU law as a prelude to possible future membership of the EU. Therefore, EU competition law, which concerns the anti-competitive and concerted practices, abuse of a dominant position and preferential state aids that distort competition, must be taken into account regarding any business practices in the Czech Republic. Competition law could provide an alternative screening procedure for foreign investment to examine any threat of damage to national industry by means of merger or acquisition. In this perspective, the protection of indigenous industries could be based on the ground of the concern for consumers and the availability of a range of choice of products, which can include cultural diversity.

ASEAN countries follow an "Open Door" policy and thus liberalise investment so regional competition law, which is consistent to liberalisation, would play an important role in protecting domestic firms from damage such as in the Czech Beer case. ASEAN can thereby reconcile a positive approach to foreign investors,

[26] The Czech Republic has become a party to an EU Europe Agreement (EA), which entered into forced on 1 February 1995 to ensure greater convergence between EU economic laws and the national law of the non-EU contracting states, as a precondition for any future application for membership.

justified by the lack of regulatory control, while at the same time exercising control over undesirable market and social effects of FDI through laws that apply to foreign and domestic firms alike, notably competition law, merger & acquisition control regulation, and anti-monopoly control[27]. In this way control over foreign investors and the preservation of the equal treatment of foreign investors and domestic investors in the same area of industry can be reconciled.

Therefore, ASEAN indigenous industries could be protected under the ASEAN regional competition law and policy, and by a regional merger control regulation. Moreover, consumer and local interest group opinion concerning some particular business or industries can be taken into account by the authority concerned[28].

In conclusion, the function of regional competition law and policy and the regional merger control regulation would be to ensure the review of mergers in ASEAN countries lacking effective domestic controls and lacking experiences in dealing with mergers and acquisitions so that member countries would be able to engage the support of the Regional Merger Task Force where concentration occurs that has significant actual or potential anti-competitive effects within any member countries. An ASEAN regional competition law and policy could ensure that regional economic strength would be enhanced and strengthened and that the regional open market that welcomes non-ASEAN trade and investment would not allow foreign firms to entirely dominate the regional economy. This complies with the main concept of open regionalism to enhance both intra- and extra- ASEAN trade and investment,

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[27] Muchlinski argued that "Maximum foreign shareholding limits in national laws have tended to be relaxed. The most promising avenue for regulation in competition law, in that a level of foreign ownership that may create an anti-competitive concentration can be legitimately challenged without upsetting the logic of free market policies. See Muchlinski (1996: 59).

[28] For instance, the issue can be brought to the Regional Merger Task Force, within the spirit of the Regional Merger Regulation, consumer groups can request that the Task Force review a concentration where FDI creates or strengthens a dominant position or merge & acquire such domestic firms.

so regional competition law and policy can be the suitable instruments facilitating the achievement of this goal.

Chapter 7

Conclusion: Institutional Implications of ASEAN's New Direction

7.1 Balancing Generalised Liberalisation with Deeper Regional Integration

The changing global economy and legal framework for trade and investment has implications for closer economic integration within ASEAN. But ASEAN faces dilemmas in its integration. There are several major challenges facing the region. Trade and investment are the main issues which concern all of the countries in the region, not just in their economic aspects, but also in revising policies, laws and regulations to comply with global regulations for trade and investment. For instance, there will be no tolerance for export subsidies. Trade-related investment measures have to be eliminated. Almost all East Asian countries have to graduate from the GSP. The role of government intervention, ranging from controls over the financial sector, promoting targeted industries with government investment and/or subsidised credit, subsidising declining industries, protecting domestic import substitutes by providing investment incentives, developing export marketing institutions, are all to be eliminated.

ASEAN countries have been aware of this situation and of the future they will face, and have been attempting to adapt their strategies to sustain and even to develop economic growth in the region. Regional economic integration has been seen as an essential process for reaching this goal. They can gain advantages from the enlargement of their intra-regional market and the exploitation of economies of scale. This will in turn attract more foreign investment and is favourable to the location of TNCs network in the region. Therefore, with the presence of global firms and

networks in East Asia, the region can maintain its economic linkage with the rest of the world and its integration with the global economy. The intra-firm and intra-industry trade made by TNCs within the region will enable East Asian countries to become more integrated.

Consequently, a new approach of balancing "Open Regionalism" and deeper regional integration, based on a harmonious legal system and the mutual recognition principle, needs to be implemented in the region. Open economic integration is consistent with the globalisation and the world-wide liberalisation of trade and investment, as this integration process does not create an economic bloc excluding non-members of the group. ASEAN has been implementing deeper economic integration in the region while opening its market to outsiders. This is a new direction for ASEAN in balancing generalised liberalisation with deeper regional integration.

Thus the rationale for implementing the ASEAN Free Trade Area (AFTA), linked with the liberalisation of investment (AIA) and trade in services (AFAS) as well as co-operation in IP, is to develop the Southeast Asian region as one market generating economies of scale which will benefit firms doing business in the region.

However, unlike the EU single market which is based on a supranational legal system facilitated by centralised regional institutions nurtured by a common political will, ASEAN does not have a regional supranational legal and institutional infrastructure. In practice, they concertedly implement liberalisation arrangements, which are based on the regional consensus achieved by the "Musyawarah" method (discussed in chapter 2). Therefore, at this stage, ASEAN does not intend to generate a regional centralised/supranational legal and institutional infrastructure. Rather, individual ASEAN countries opt to unilaterally liberalise their trade and investment regime, based on the consensus mutually agreed by the member countries.

However, regarding internal integration, ASEAN must bear in mind that continued regulatory differences, divergent interpretations of regional legal issues, and the different economic policies of ASEAN members, may burden and distort economic flows. To facilitate such regional economic attractiveness inevitably requires a certain level of legal and institutional integration. This raises the question of what degree and type of institutionalisation should be appropriate for ASEAN and what areas require such integration. Regarding the pattern of integration, what form of integration might be properly implemented in the ASEAN region? Generally, treaties or agreements aimed at economic integration begin by emphasising the elimination of barriers to regional trade. However, economic integration entails not only the free movement of products but of factors of production between a group of countries. This in turn means a degree of harmonisation or co-ordination of national economic policies, as well as of a range of internal rules and regulations. Therefore the removal of barriers at the border is only one aspect of effective regional economic integration. Hence, various issues become critical to the effectiveness of a regional organisation. As Fitzpatrick has stated:

> "An often ignored central determinant is the breadth of substantive regulation and the level of integration sought to be established by the regime in relation to the efficacy of supranational legal institutions" (Fitzpatrick, 1996: 2).

From this point of view, ASEAN now needs to decide which pattern of integration and what mechanisms are suitable and would function well for ASEAN's new direction. It is important to consider the level of integration, what degree of diversity is optimal in ASEAN integration, and what forms and mechanisms of harmonisation should be implemented. Thus, the mechanisms, structural organisation and even the decision-making bodies as well as "the ASEAN way", which were appropriate for the earlier stage might now be inappropriate and ineffective in the

implementation of the new schemes. It is certainly arguable that ASEAN needs a more effective and efficient legal and institutional framework for implementing these new agreements.

Once the member countries of ASEAN have removed the border barriers to economic transactions among them and implemented the free circulation of trade and investment within the region, most of the discrimination formerly caused by different national requirements also have to be eliminated. It is essential for them to go beyond the removal of border barriers. If they are to deal with the problems that result from this freedom of transactions, and to make the most of the opportunities for increasing welfare that are offered by the larger market, they must co-ordinate their national policies and/or form common policies that go well beyond the mere removal of overt discrimination (Pinder, 1972: 125). This is because it is not only border barriers that create obstacles to the free flow of economic transactions, but also distortions caused by disparities between internal rules and regulations of those countries, especially the high degree of disparity among ASEAN laws discussed below. The regulatory differences encountered by the economic actors and their transactions result in different practices and applications. These disparities and differences might burden the flows of business among ASEAN members. Thus, economic integration needs a legal and institutional framework for implementing regionalisation at a certain level.

The reasons for the failure of regional economic integration are diverse (Fitzpatrick, 1996), but the common thread among them is the weakness and insufficiency of legal co-ordination arrangements and institutions for facilitating the implementation of those regional groupings.

Even though ASEAN as well as APEC claims to aim at an open regionalism that needs less formalisation, nevertheless a degree of harmonisation and co-ordination

of laws and regulations is still essential because regulatory differences may ultimately decrease the potential benefits of free trade and investment, and may create conflict between contracting parties. The harmonisation of laws and regulations need not cover all areas of law nor at all level but at what level and in what areas that need to be harmonized, and in what form or by which mechanism depends on the level of integration and also on what purpose and scope of integration. This issue has been vastly debated and it is problematic in practice. Even in the EU, it has taken more than 40 years to develop processes for harmonisation of laws and regulations. Experience has shown that an international economic organisation with neither the authority to develop and modernise a comprehensive and harmonised legal regime relating to regional economic issues, nor the power to enforce compliance with regional laws, will be incapable of integrating the economies of the member states (Del Duca, 1993: 485, 489; Ndulo, 1993: 101, 104). Nevertheless, ASEAN may not need the same model and approach in legal and institutional harmonisation as for example the EU, but has alternatives such as regulatory co-operation and co-ordinated legal networks that now are increasingly proven to be necessary at an international level (Picciotto, 1998). This emergent approach is probably more suitable in the case of ASEAN where open regionalism is implemented, based mainly on concerted unilateral liberalisation.

An example of the problematic implementation of ASEAN's new schemes where an effective mechanism is lacking is the AIA. It advocates the elimination of all legal and related barriers to investment flows; however, various aspects of restriction on foreign investment still exist and different legal systems remain. Therefore, the current loosely binding organisation of ASEAN may be inappropriate to implement the objectives of the AIA due to the regulatory differences, restricted investment sectors, screening processes, limited ratio of foreign share holding, and other requirements

stipulated in individual ASEAN countries' investment laws and regulations. Thus the mere stated aim and intention of attracting foreign investment and of facilitating an investment area in the region, without providing any mechanisms, institutions, and processes of legal harmonisation for attaining the achievement of the ASEAN Investment Area, may have limited results. Therefore, ASEAN should institutionalise its integration effort regionally, through initiatives such as the harmonisation of standards, common rules of fair competition, removal of internal non-tariff barriers, and macroeconomic consultation. The idea of harmonious laws[1] does not require a fully unified or harmonised system of laws. Harmonious laws might remain national provided they have regional consistency and impartiality. The limited implementation arrangements have already proven to be insufficient and ineffective in the realisation of regional economic integration in previous ASEAN economic co-operation schemes (Haas, 1994: 809, 812-20). Therefore, ASEAN needs to strengthen its legal and institutional framework for effectively implementing ASEAN regional integration, and this is ASEAN's dilemma in choosing the best integration pattern that fits with the open regional approach.

ASEAN needs to elaborate measures to facilitate ASEAN regionalisation. These include:

- the development of the administrative and legislative infrastructure necessary for the functioning of a market economy;
- the fixing of a calendar for the adoption of the ASEAN "one regional market", which is important in helping the realisation of deepening integration;
- the strengthening of economic co-operation;
- support for private investment;
- facilitation and improvement of intra-regional trade concession;
- measures in the field of free movement of workers, capital, and goods;
- development of a regional competition law and policy;

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[1]. Harmonious musical notes produce a pleasant sound when play together just as same as the harmonious laws that effectively enforced consistently when they apply together harmoniously.

- facilitation of the transfer of technology and managerial skills, and a better involvement of the private sector;
- private sector participation in public infrastructure network projects.

ASEAN now needs to consider which pattern of integration suits the ASEAN way. Even though "Open Regionalism" means ASEAN does not create barriers to non-members, the realisation of a single ASEAN market could be achieved only through a realistic and effective pattern of integration.

Pinder (1972: 126) has defined Positive Integration as the formation and application of co-ordinated and common policies in order to fulfil economic and welfare objectives other than the removal of discrimination, while Negative Integration consists of the removal of discrimination between the economic agents of the member countries. Tinbergen defines negative integration as "the elimination of certain instruments of international economic policy", and the "positive policy of integration as entailing supplementary measures in order to remove inconsistencies that may exist between the duties and taxes of different countries", plus "positive action in the field of production" in order to put through a "re-organisation programme" (Pinder, 1972: 126). Tinbergen bases his distinction between the two terms on whether policy instruments are to be eliminated or new policies formed. On the other hand, Pinder bases his on whether the purpose is to remove discrimination or to maximise welfare in other ways.

From the above definitions of positive and negative integration, ASEAN integration is likely to be regarded, at its current stage of development, as negative integration. ASEAN has been eliminating barriers to economic transactions or has been removing discrimination within member countries, but has not yet formed or applied co-ordinated and common policies. Therefore, ASEAN has not yet shifted to positive integration. All ASEAN framework agreements state a broad integration

policy, or simply declare the intention of ASEAN countries, while the implementation of the framework agreements, is left to be done by each individual ASEAN country through laws and regulations at the national level. Thus, if ASEAN needs to maintain this characteristic of a co-ordinated regulatory network among ASEAN members, it might need to strengthen the pattern of the emergent concept of a regulatory network (Picciotto, 1996) and the concept of layer governance (Yarbrough and Yarbrough, 1994: 95-117) at a regional level. This new approach is also facilitating the new age of globalisation. ASEAN practice appears to fit within a combined pattern that is based on negative integration facilitated by the new approach of regulatory networks and layered governance, both of which ASEAN is required to develop.

7.2 Alternative Institutional Models

Now ASEAN also needs to choose a mechanism for its integration. The main options are:

1) institutionalised with regional suprainstitutions as implemented in the EU, facilitating the harmonisation of laws, based on mutual recognition, and a degree of regulatory competition;
2) federalist regulatory system as implemented in the US;
3) decentralised regulatory networks with regulations enforced nationally but co-ordinated through regional government-to-government procedures.

Consideration of the possible institutional models that might be suitable for ASEAN must be related to the historical back ground and current legal systems as well as political basis of ASEAN. As mentioned earlier, there is a high degree of disparities among ASEAN countries. The differences in legal and political systems were influenced by their previous colonial masters, which had different legal and political systems. The legal systems of member countries of ASEAN differ greatly, ranging from common to civil law systems, and to hybrids of both. Common law forms the basis for the legal systems of Brunei, Malaysia, and Singapore. Spanish and US laws

significantly influence the Philippines' legal system. The Indonesian legal structure follows the basic constructs of the Dutch legal system and the Thai legal system derives from the amalgamation of continental and common law structures (Winslow, 1986: 42; Radhie, 1986: 50-54). Moreover, each country also has its own culture and identity. Asia is a mix of various cultures, unlike Europe, it is composed of Malay, Chinese, Indian and indigenous cultures. The nationalism of these countries is also strongly emphasised as they had been colonised for centuries by foreign powers, these countries thus prefer to be independent rather than being bound by supranational power. This is a deep sentiment for Asian people. Also they are geographically distant, even though they are in the same region, many of them are islands far apart from each other.

Therefore, deep economic integration with supranational institutions, as implemented in Europe, is unlikely to happen in ASEAN and the Asia-Pacific region in the near future. The Federalist model is also not favoured by ASEAN countries, as they have not developed as federal states within the region. ASEAN has developed on "the market dynamism model" with an emphasis on unilateral liberalisation, and now they have agreed to liberalise concertedly. Thus they prefer to develop a system of co-ordinated regulatory networks and mutual recognition. This approach is more flexible and may allow ASEAN countries to maintain their national laws and regulations as well as their legal requirements, provided that they are consistent with and complementary to the ASEAN integration schemes, and that they are harmoniously implemented to facilitate regional integration. This model appears to fit ASEAN ideology and the practice of open regionalism.

However, in practice, a combination of models is possible; for instance, the EU, which is based on a centralised/supranational legal and institutional framework,

has also developed new approaches and combined models, as it proved impossible to harmonise every law and regulation. German and French laws, for example, remain highly national. Thus the mutual recognition approach has been accepted in the EU, combined with a level of harmonisation.

Therefore, the development of ASEAN's new direction of integration may initially adopt decentralised but co-ordinated regulatory networks and then shift to more positive integration facilitated by the harmonisation of laws and legal integration, or by a hybid approach of a combination of models. It is also arguable that legal integration is crucial to the success of an economic integration agreement. It has been observed that the creation of a dynamic system of law requires an institutional structure with decision-making powers, and the ability to react to changing needs. The surrender of sovereignty in the form of harmonising a certain level of the contracting countries' legal regimes and creating dispute resolution institutions contribute to successful economic integration (Del Duca, 1993: 549). Nevertheless, "the amount of sovereignty required to be surrendered is proportionate to the level of integration sought to be achieved" (ibid.). This should reflect the degree of legal harmonisation among ASEAN member countries, or in other words, what degree of diversity is tolerable. This would allow ASEAN countries to decide what level of integration they wish to achieve and what degree of legal integration they are required to perform, and therefore what proportion of sovereignty they are willing to surrender, and also to what extent they need regional institutions.

Regarding the different factors in the integration process, they are firstly institutional integration, which refers to the collective decision-making institution necessary to develop and enhance norms promulgated pursuant to the goal of economic integration. The second factor is policy integration, which concerns the

extent of policy-making power transferred to higher levels of government. The third is attitudinal integration, describing the degree to which public opinion within the area is a source of support for regional integration. And the last factor is security integration, which connotes the creation of a security community (Jordan and Feld, 1986: 91-92). However, it is important to note that the degree to which these integration aspects are implemented is a subject of considerable complexity, which requires a clear consensus. Therefore, the very basic ground on which economic integration can be implemented is rooted in the political will of the members and the aims and purposes of such integration as agreed by member countries.

7.3 Strengthening ASEAN's Insitutional Framework

With the launches of AFTA, AIA, and AFAS, the process of ASEAN regional integration has become increasingly rapid, and ASEAN needs to sustain the region's international competitiveness on a world scale. This competitive pressure has stimulated ASEAN policy-makers to think more seriously about how to embark upon institutionalised integration in order to facilitate effective ASEAN economic integration with the world. It is important to underline that processes such as the harmonisation of standards, the mutual recognition of tests and certification of products, the mutual recognition of qualifications of service providers, and harmonised procedural requirements are very crucial, and they link with the removal of NTBs or regulatory differences. It needs to be made clear here that even negative integration implemented by any economic grouping still involves this process at a certain level for the purpose of the elimination of barriers to economic transactions. Therefore, in principle, legal integration, to a certain degree, is still crucial to the success of an economic integration agreement. Thus the institutional structure may also need to be developed. As Cremona has argued, "the creation of a dynamic system of law requires

an institutional structure with decision-making powers able to react to changing needs" (Cremona, 1994: 508-9). Regionalisation inevitably involves a certain level of harmonisation, co-ordination or mutual recognition of laws if deeper integration is an aim.

The absence of harmonised ASEAN Laws implies a degree of risk for business networks and investment decisions. The question of how to ensure compliance by national administration *vis-à-vis* business is raised. One needs less law if public intervention is low, if the private market is preponderant and functions well, and if adequate rules of competition exist. Without this, and opting to avoid "ASEAN Law", one needs to devise other compliance mechanisms which underpin business confidence. Without sufficient guarantees for legal security, one either encourages 'private deals' or discourages business interest in the region.

At present, ASEAN has a very flexible legal framework to implement regional economic integration. Apart from the assertion of the principle of mutual recognition among ASEAN members, ASEAN has not created any judicial or monitoring institution to ensure the co-ordination of legal norms relevant to regional commerce, nor does it provide for any harmonisation. Pelkmans (1997:211) thus argues that "ASEAN lacks a treaty basis". In fact, all ASEAN agreements concluded among member countries are a kind of legal instrument and can be regarded as a "treaty" under the Vienna Convention on the Law of Treaties of 1969[2].

Therefore, all ASEAN agreements are indeed legal instruments and bind member countries. However, these agreements lacks substantive details and mechanisms for effective implementation, as they are mainly general framework

agreements, and in practice leave the details and implementation process to the ASEAN member countries to sort out. They mainly function politically, based on the general legal commitment provided in such Framework Agreements.

These flexible framework agreements allow ASEAN countries to negotiate and seek solutions for the implementation of practical details later, which will lead to the creation of subsidiary agreements for implementation of the main framework agreements. Until now, thay have been usually made in the form of an "Action Plan" or "Protocol" annexed to the framework agreements. From a legal point of view, they are a legalistic commitment but are propelled by the political will of ASEAN countries. The only provision for resolution of disputes was that contained in the 1976 Treaty of Amity and Co-operation, which called for the creation of a system of peaceful dispute settlement. However, until now ASEAN countries have essentially relied on diplomatic negotiations.

Recently, to begin to address the question of enforcement of the framework agreements, ASEAN has shifted to the WTO style by concluding a Protocol on a Dispute Settlement Mechanism[3]. This encourages the amicable settlement of disputes between member states through their representatives by consultation and by other special procedures, or by additional rules and procedures on dispute settlement contained in the covered agreement. If these fail then the mechanisms of Good Offices, Conciliation or Mediation can be sought. The subject matter of the disputes is mainly in respect of the implementation, interpretation or application of the agreements.

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[2] Art. 2 (a) of the 1969 Vienna Convention provided that "Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;".

[3] The Protocol on Dispute Settlement Mechanism was done on 20th November 1996 at Manila, the Philippines to expand Art. 9 of the AFTA Agreement to strengthen the mechanism for the settlement of disputes in the area of ASEAN economic co-operation. The rules and procedures of this protocol apply

Therefore, if any member country considers that another has failed to comply with any ASEAN agreement listed in the Annex, the affected country may make a request to that country, which is then required to reply to the request within ten days, and the parties shall enter into consultation within thirty days. If the consultation fails within sixty days, the matter shall be raised to the SEOM to establish a panel, or a special body where applicable, within thirty days. The panel will report to the SEOM within sixty days, with another ten days extension in exceptional cases. The SEOM will make a ruling within thirty days, also with ten days extension in exceptional cases. The parties to the dispute may appeal the ruling by the SEOM to the ASEAN Economic Ministers (AEM) within thirty days of the ruling and the AEM will make a decision within thirty days, with another ten days' extension in special cases. Parties to the dispute shall comply with the decision within thirty days or within a mutually agreed period not exceeding thirty days. Compensation and the suspension of concessions will apply to the party which failed to comply with the decision of AEM or with the ruling of SEOM. The main advantage of the Protocol is the rapid time frame and the effective enforcement of the decisions. This is a step towards stricter dispute settlement procedures, and a perhaps more legalistic process.

This development, in fact, reflects the necessity for ASEAN to shift toward positive integration and to strengthen ASEAN's institutional framework, as the new framework agreements are more complex and directly involve international players, and the inadequacy of ASEAN mechanisms may fail to achieve the aims of integration schemes. New arrangements also require effective facilities for the removal of barriers caused by regulatory differences and disparities between ASEAN countries. This does

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to ASEAN agreements annexed to the Protocols which are all the agreements made between ASEAN, and covers all future ASEAN economic agreements.

not necessarily mean the removal of national regulations or the creation of ASEAN laws substituting domestic ones, but to ensure the enforcement of national laws and regulations in conformity with each other and without unnecessary obstacles to regional economic transactions.

In 1983 when ASEAN first reviewed its structure and organisation, the ASEAN Standing Committee agreed with the advice of the ASEAN Law Association (ALA) to initiate regional co-operation in the legal field. They called for legal co-operation in the field of the judiciary, legislature, law enforcement, and legal education (Haas, 1994: 859). However, so far legal co-operation between ASEAN countries has not made significant progress other than to establish limited judicial co-operation in procedural areas, including servicing of documents, obtaining evidence in civil and commercial matters, reducing obstacles to filing suit and making appearances in the courts of another ASEAN country[4]. The other recommended areas of law for harmonisation, especially rules affecting intra-ASEAN trade, investment, international activities and regulations, are far from being realised. In fact, regional rules concerning trade, business, industry, taxation, transportation, communication, science and technology, patent, immigration, private international law and other related fields were also recommended by the ALA (Valera-Quisumbing, 1986: 1-13).

As ASEAN countries integrate regionally and also integrate into the global economy, it has become necessary to create more effective implementation mechanism in the region. Despite the changes since 1976, ASEAN has not yet moved forward towards any form of regional court. It has preferred to retain the basic philosophy of

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[4]. Valera-Quisumbing (1986: 1-13) pointed out that "ASEAN member countries have concluded a bilateral agreement on Judicial Cooperation that covers service of judicial documents, obtaining evidence, as well as reciprocal free access of nationals to the courts of either jurisdiction. Additionally, extradition treaties currently exist between Thailand and Indonesia, the Philippines and Indonesia, and

non-confrontation and consensus. ASEAN lacks a mechanism for settling private disputes that may arise either between private enterprises or between private enterprise and government. Now ASEAN is moving towards closer integration in the field of investment and services, as discussed in chapter 5, ASEAN is facilitating the right of establishment within the regiona of firms once established in one ASEAN country. This is implemented under the AIA through the concept of the ASEAN investor, and in AFAS through that of a service provider engages in substantive business operations in an ASEAN country, both companies and natural persons. Consequently, there might be problems arising from the implementation of ASEAN member countries regarding the approval of non-ASEAN company which wishes to exercise this right to establish itself in any ASEAN country, either under the AIA or AFAS. If any ASEAN country refuses to approve the entry of any company, such company would have to seek a solution under the appropriate chanel provided by ASEAN. For this to be effective, improved remedies are necessary to ensure that, if private company or natural person has been deprived of rights and privileges granted under the stated agreements, it will have opportunity to bring the case to ASEAN to settle such disputes. Therefore the question of a dispute settlement mechanism for the private sector is now coming to the fore, as this would ensure the confidence of investors or service providers from both inside and outside ASEAN.

To codify an ASEAN legal framework could formalise and harmonise ASEAN laws and regulations, thus increasing the expectations of community law for ASEAN members and outside trading partners. Harmonious laws and regulations in the region would, in turn, provide ASEAN with certainty, security and predictability as well as

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Malaysia and Indonesia. ASEAN may broaden these agreements to include such right and responsibilities among and between all member countries".

incentives to engage in trade deals and foreign direct investment, and provide a sense of potential outcome in disputes.

7.4 Towards the Harmonisation of ASEAN Laws and the Creation of an ASEAN Legal System

In its present form, ASEAN cannot exert any legal control over the regional economy. The current ASEAN Framework Agreements, even the most recently launched packages for economic integration, such as AIA, AFTA, AFAS and Intellectual Property Co-operation, are merely declared intentions and objectives to implement closer regional economic co-operation. The proposed advances in economic integration are only potentially implemented through legally binding instruments at a regional level, which can regulate the conduct of member countries, their conformity with agreed rules, and the consequences of non-compliance. However, ASEAN countries may firstly need to create the political will and the political basis for realising the ultimate goal of regional integration. They need to elaborate and delineate a course of action and a set of procedures for implementing recognised policies. Then a further step is to determine the choice of appropriate models of legal regimes, the form of integration, and to construct their own system, i.e. ASEAN regulatory networks.

The preliminary stage in formulating regional legal rules should focus on the harmonisation of certain relevant laws through co-ordination plans of member countries. In the case of ASEAN, it would be more realistic to take certain preliminary steps to create an ASEAN legal regime by designating fields in which to formulate regional legal rules. These fields may include some aspects of investment; the entry and establishment as well as the operation of foreign investment; mutual recognition of substantive and procedural requirements for both merchandise and service trade; harmonisation of double taxation avoidance; competition rules and policy; labour

standards; intellectual property protection co-operation; transportation; communications; and dispute settlement for the private sector. A further step would be to harmonise those national laws or implement regulatory co-operation in certain areas that affect the implementation of ASEAN framework agreements and also related areas of laws. This would enable ASEAN members to have similar rules governing particular activities. This could be achieved by promulgating "model laws".

As mentioned earlier, ASEAN appears to be taking preliminary steps in adopting the negative integration model that implements 'bottom up' liberalisation by eliminating barriers to free trade and investment from the bottom rather than by imposing a 'top down' liberalisation regime. Apart from the recommended harmonisation of laws, the new emergent approach of regulatory networks may be adopted by ASEAN where some areas of laws that cannot be harmonised might harmoniously remain anyway, based on a network system reinforced by the mutual recognition principle.

Indeed, the dichotomy of economic integration of ASEAN reflects the global trend of the balance between globalisation and regionalisation that has been debated broadly. This new direction of economic integration is a compromise between the ideologies of the closed trading block and the outward-looking economy. While deepening regional economic integration, and granting preferential treatment among member states of that economic grouping, it does not necessarily create a stumbling block for outsiders. Members of such a regional grouping can still welcome trade and investment flows from outside by keeping the margin of preferences as low as they can, and also because of the attractiveness of economies of scale, the enlarged market, and free mobilisation within the region enjoyed by outsiders when they enter the region. This enables outsiders to trade and invest in such regional groupings without

significant barriers, so that regionalism and globalisation are balanced and consistently implemented. In this way, various countries in different regions with different level of economic development can take part in a harmonious global economy, through either their own regionalisation or through globalisation as they consider appropriate.

It appears that the new millennium round of WTO negotiations might encounter complex problems and difficulties, not only between the North and South, but also among members in the North and their citizens. If the gap between the North and South, and conflicts of ideologies on economic development between the two, can be narrowed such that both poles can realise their economic interests in their own ways but still be consistent with the global rules through a new approach of balancing regionalism with globalisation, then this would contribute greatly to global economic progress. On the one hand, this would allow more participation by developing countries in shaping the global regulatory regime in which they are governed. On the other hand, a multilaterally agreed set of rules and regulations on trade-related issues including investment that has never been agreed in the past may be able to be elaborated so that international standards and norms governing international economic activities can be gradually set up. The ultimate goal of global regulations is to help generate wealth among nations and also to help distribute wealth more evenly. The concept that a new direction for ASEAN is to balance regional and global liberalization and therefore to reduce North/South polarisation is an ambitious one, yet this may well be the new trend for the next millenium of regionalisation.

Annex 1

FRAMEWORK AGREEMENT ON ENHANCING ECONOMIC COOPERATION

Singapore, 28 January 1992

The Sultan of Brunei Darussalam, the President of the Republic of Indonesia, the Prime Minister of Malaysia, the President of the Republic of the Philippines, the Prime Minister of the Republic of Singapore and the Prime Minister of the Kingdom of Thailand:

REAFFIRMING their commitment to the ASEAN Declaration of 8 August 1967, the Declaration of ASEAN Concord of 24 February 1976, the Treaty of Amity and Cooperation in Southeast Asia of 24 February 1976, the 1977 Accord of Kuala Lumpur and the Manila Declaration of 15 December 1987;

DESIRING to enhance intra-ASEAN economic cooperation to sustain the economic growth and development of all Member States which are essential to the stability and prosperity of the region;

REITERATING their commitment to the principles of the General Agreement on Tariffs and Trade (hereinafter referred to as "GATT");

RECOGNISING that tariff and non-tariff barriers are impediments to intra-ASEAN trade and investment flows, and that existing commitments to remove these trade barriers could be extensively improved upon;

NOTING the significant unilateral efforts made by Member States in recent years to liberalise trade and promote investments, and the importance of extending such policies to further open up their economies, given the comparative advantages and complementarity of their economies;

RECOGNIZING that Member States, having different economic interests, could benefit from subregional arrangements;

CONSCIOUS of the rapid and pervasive changes in the international political and economic landscape, as well as both challenges and opportunities yielded thereof, which need more cohesive and effective performance of intra-ASEAN economic cooperation;

MINDFUL of the need to extend the spirit of friendship and cooperation among Member States to other regional economies, as well as those outside the region which contribute to the overall economic development of Member States;

RECOGNISING further the importance of enhancing other fields of economic cooperation such as in science and technology, agriculture, financial services and tourism;

HAVE AGREED AS FOLLOWS :

ARTICLE 1 : PRINCIPLES

1. Member States shall endeavour to strengthen their economic cooperation through an outward-looking attitude so that their cooperation contributes to the promotion of global trade liberalisation.

2. Member States shall abide by the principle of mutual benefit in the implementation of measures or initiatives aimed at enhancing ASEAN economic cooperation.

3. All Member States shall participate in intra ASEAN economic arrangements. However, in the implementation of these economic arrangements, two or more Member States may proceed first if other Member States are not ready to implement these arrangements.

ARTICLE 2 : AREAS OF COOPERATION

A. Cooperation in Trade

1 . All Member States agree to establish participate in the ASEAN Free Trade Area (A within 15 years. A ministerial-level Council will be up to supervise, coordinate and review the implementation of the AFTA.

2. The Common Effective Preferential Tariff (CEPT) Scheme shall be the main mechanism for the A For products not covered by the CEPT Scheme, ASEAN Preferential Trading Arrangements (PTA) or other mechanism to be agreed upon, may be use

3. Member States shall reduce or eliminate non tariff barriers between and among each other on the import and export of products as specifically agreed upon under existing arrangements or any other arrangements arising out of this Agreement.

4. Member States shall explore further measure on border and non-border areas of cooperation supplement and complement the liberalisation of trade.

B. Cooperation in Industry, Minerals and Energy

1 . Member States agree to increase investment industrial linkages and complementarity by adoption new and innovative measures, as well as strengthening existing arrangements in ASEAN.

2. Member States shall provide flexibility for new forms of industrial cooperation. ASEAN shall strengthen cooperation in the development of the minerals sector.

3. Member States shall enhance cooperation in the field of energy, including energy planning, exchange of information, transfer of technology, research an development, manpower training, conservation an efficiency, and the exploration, production and supply of energy resources.

C. Cooperation in Finance and Banking

1. Member States shall strengthen and develop further ASEAN economic cooperation in the field of capital markets, as well as find new measures to the increase cooperation in this area.

2. Member States shall encourage and facilitate free movement of capital and other financial resources including further liberalisation of the use of ASEAN currencies in trade and investments, taking into account their respective national laws, monetary controls and development objectives.

D. Cooperation in Food, Agriculture and Forestry

1 . Member States agree to strengthen region cooperation in the areas of development, production and promotion of agricultural products for ensuring for security and upgrading information exchanges in ASEAN.

2. Member States agree to enhance technical joint cooperation to better manage, conserve, develop and market forest resources.

E. Cooperation in Transportation

1 . Member States agree to further enhance regional cooperation for providing safe, efficient an innovative transportation and communications infrastructure network.

2. Member States shall also continue to improve and develop the intra-country postal and

telecommunications system to provide cost-effective, high quality, high quality and customer-oriented services.

ARTICLE 3 : OTHER AREAS OF COOPERATION

1. Member States agree to increase cooperation in research and development, technology transfer tourism promotion, human resource development an other economic -.related areas. Full account shall also be taken of existing ASEAN arrangements in these

2. Member States, through the appropriate ASEAN bodies, shall regularly consult and exchange views on regional and international developments and trends,

ARTICLE 4 : SUB-REGIONAL ECONOMIC ARRANGEMENTS

Member States acknowledge that sub-regional arrangements among themselves, or between ASEAN Member States and non-ASEAN economies, could complement overall ASEAN economic cooperation.

ARTICLE 5 : EXTRA-ASEAN ECONOMIC COOPERATION

To complement and enhance economic cooperation among Member States, and to respond to the rapidly changing external conditions and trends in both the economic and political fields, Member States agree to establish and/or strengthen cooperation with other countries, as well as regional and international organisations and arrangements.

ARTICLE 6 : PRIVATE SECTOR PARTICIPATION

Member States recognise the complementarity of trade and investment opportunities, and therefore encourage, among others, cooperation and exchanges among the ASEAN private sectors and between ASEAN and non-ASEAN private sectors, and the consideration of appropriate policies aimed at promoting greater intra-ASEAN and extra-ASEAN investments and other economic activities.

ARTICLE 7 : MONITORING BODY

The ASEAN Secretariat shall function as the body responsible for monitoring the progress of any arrangements arising from this Agreement. Member States shall cooperate with the ASEAN Secretariat in the performance of its duties.

ARTICLE 8 : REVIEW OF PROGRESS

The ASEAN Economic Ministers' Meeting and its subsidiary bodies shall review the progress of implementation and coordination of the elements contained in this Agreement.

ARTICLE 9 : SETTLEMENT OF DISPUTES

Any differences between the Member States concerning the interpretation or application of this Agreement or any arrangements arising therefrom shall, as far as possible, be settled amicably between the parties. Whenever necessary, an appropriate body shall be designated for the settlement of disputes.

ARTICLE 10 : SUPPLEMENTARY AGREEMENTS OR ARRANGEMENTS

Appropriate ASEAN economic agreements or arrangements, arising from this Agreement, shall form an integral part of this Agreement.

ARTICLE 11 : OTHER ARRANGEMENTS

1. This Agreement or any action taken under it shall not affect the rights and obligations of the Member States under any existing agreements to which they are parties.

2. Nothing in this Agreement shall affect the power of Member States to enter into other agreements not contrary to the terms and objectives of this Agreement.

ARTICLE 12 : GENERAL EXCEPTIONS

Nothing in this Agreement shall prevent any Member State from taking action and adopting measures which it considers necessary for the protection of its national security, the protection of public morals, the protection of human, animal or plant life and health, and the protection of articles of artistic, historic and archaeological value.

ARTICLE 13 : AMENDMENTS

All Articles of this Agreement may be modified through amendments to this Agreement agreed upon by all the Member States. All amendments shall become effective upon acceptance by all Member States.

ARTICLE 14 : ENTRY INTO FORCE

This Agreement shall be effective upon signing.

ARTICLE 15 : FINAL PROVISION

This Agreement shall be deposited with the Secretary General of the ASEAN Secretariat who shall promptly furnish a certified copy thereof to each Member State.

IN WITNESS WHEREOF, the undersigned have signed this Framework Agreement on Enhancing ASEAN Economic Cooperation.

DONE at Singapore, this 28th day of January, 1992 in a single copy in the English Language.

Annex 2
AGREEMENT ON THE COMMON EFFECTIVE PREFERENTIAL TARIFF SCHEME FOR THE ASEAN FREE TRADE AREA

The Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand, Member States of the Association of South, East Asian Nations (ASEAN):

MINDFUL of the Declaration of ASEAN Concord signed in Bali, Indonesia on 24 February 1976 which provides that Member States shall cooperate in the field of trade in order to promote development and growth of new production and trade;

RECALLING that the ASEAN Heads of Government, at their Third Summit Meeting held in Manila on 13-15 December 1987, declared that Member States shall strengthen intra-ASEAN economic cooperation to maximise the realisation of the region's potential in trade and development;

NOTING that the Agreement on ASEAN Preferential Trading Arrangements (PTA) signed in Manila on 24 February 1977 provides for-the adoption of various instruments on trade liberalisation on a preferential basis;

ADHERING to the principles, concepts and ideals of the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Singapore on 28 January 1992;

CONVINCED that preferential trading arrangements among ASEAN Member States will act as a stimulus to the strengthening of national and ASEAN Economic resilience, and the development of the national economies . of Member States by expanding investment and production opportunities, trade, and foreign exchange earnings;

DETERMINED to further cooperate in the economic growth of the region by accelerating the liberalisation of intra-ASEAN trade and investment with the objective of creating the ASEAN Free Trade Area using the Common Effective Preferential Tariff (CEPT) Scheme;

DESIRING to effect improvements on the ASEAN PTA in consonance with ASEAN's international commitments;

HAVE AGREED AS FOLLOWS:

ARTICLE 1 : DEFINITIONS

For the purposes of this Agreement :

1. *"CEPT"* means the Common Effective Preferential Tariff, and it is an agreed effective tariff, preferential to ASEAN, to be applied to goods originating from ASEAN Member States, and which have been identified for inclusion in the CEPT Scheme in accordance with Articles 2 (5) and 3.

2. *"Non-Tariff Barriers"* mean measures other than tariffs which effectively prohibit or restrict import or export of products within Member States.

3. *"Quantitative restrictions"* mean prohibitions or restrictions on trade with other Member States, whether made effective through quotas, licenses or other measures with equivalent effect, including administrative measures and requirements which restrict trade.

4. *"Foreign exchange restrictions"* mean measures taken by Member States in the form of restrictions and other administrative procedures in foreign exchange which have the effect of restricting trade.

5. *"PTA"* means ASEAN Preferential Trading Arrangements stipulated in the Agreement on ASEAN

Preferential Trading Arrangements, signed in Manila on 24 February 1977, and in the Protocol on Improvements on Extension of Tariff Preferences under the ASEAN Preferential Trading Arrangements (PTA), signed in Manila on 15 December 1987.

6. *"Exclusion List"* means a list containing products that are excluded from the extension of tariff preferences under the CEPT Scheme.

7. *"Agricultural products"* mean :

- (a) agricultural raw materials/unprocessed products covered under Chapters 1-24 of the Harmonised System (HS), and similar agricultural raw materials/unprocessed products in other related HS Headings; and

- (b) products which have undergone simple processing with minimal change in form from the original products.

ARTICLE 2 : GENERAL PROVISIONS

1 . All Member States shall participate in the CEPT Scheme.

2. Identification of products to be included in the CEPT Scheme shall be on a sectoral basis, i.e., at HS 6-digit level.

3. Exclusions at the HS 8/9 digit level for specific products are permitted for those Member States, which are temporarily not ready to include such products in the CEPT Scheme. For specific products, which are sensitive to a Member State. pursuant to Article 1 (3) of the Framework Agreement on Enhancing ASEAN Economic Cooperation, a Member State may exclude products from the CEPT Scheme, subject to a waiver of any concession herein provided for such products. A review of this Agreement shall be carried out in the eighth year to decide on the final Exclusion List or any amendment to this Agreement.

4. A product shall be deemed to be originating from ASEAN Member States, if at least 40% of its content originates from any Member State.

5. All manufactured products, including capital goods, processed agricultural products and those products falling outside the definition of agricultural products, as set out in this Agreement, shall be in the CEPT Scheme. These products shall automatically be subject to the schedule of tariff reduction, as set out in Article 4 of this Agreement. In respect of PTA items, the schedule of tariff reduction provided for in Article 4 of this Agreement shall be applied, taking into account the tariff rate after the application of the existing margin of preference (MOP) as at 31 December 1992.

6. All products under the PTA which are not transferred to the CEPT Scheme shall continue to enjoy the MOP existing as at 31 December 1992.

7. Member States, whose tariffs for the agreed products are reduced from 20% and below to O%-5%, even though granted on an MFN basis, shall still enjoy concessions. Member States with tariff rates at MFN rates of O%-5% shall be deemed to have satisfied the obligations under this Agreement and shall also enjoy the concessions.

ARTICLE 3 : PRODUCT COVERAGE

This Agreement shall apply to all manufactured products, - including capital goods, processed agricultural products, and those products failing outside the definition of agricultural products as set out in this Agreement. Agricultural products shall be excluded from the CEPT Scheme.

ARTICLE 4 : SCHEDULE OF TARIFF REDUCTION

1 . Member States agree to the following schedule of effective preferential tariff reductions:

- (a) The reduction from existing tariff rates to 20% shall be done within a time frame of 5 years to 8 years, from 1 January 1993, subject to a programme of reduction to be decided by each Member State, which shall be announced at the start of the programme. Member States are encouraged to adopt an annual rate of reduction, which shall be (X-20)%/5 or 8, where X equals the existing tariff rates of individual Member States.

- (b)The subsequent reduction of tariff rates from 20% or below shall be done within a time frame of 7 years. The rate of reduction shall be at a minimum of 5% quantum per reduction. A programme of reduction to be decided by each Member State shall be announced at the start of the programme.

- (c) For products with existing tariff rates of 20% or below as at 1 January 1993, Member States shall decide upon a programme of tariff reductions, and announce at the start, the schedule of tariff reductions. Two or more Member States may enter into arrangements for tariff reduction to O%-5% on specific products at an accelerated pace to be announced at the start of the programme.

2. Subject to Articles 4 (1) (b) and 4 (1) (c) of this Agreement, products which reach, or are at tariff rates of 20% or below, shall automatically enjoy the concessions.

3. The above schedules of tariff reduction shall not prevent Member States from immediately reducing their tariffs to O%-5% or following an accelerated schedule of tariff reduction.

ARTICLE 5 : OTHER PROVISIONS

A. Quantitative Restrictions and Non-Tariff Barriers

1. Member States shall eliminate all quantitative restrictions in respect of products under the CEPT Scheme upon enjoyment of the concessions applicable to those products.

2. Member States shall eliminate other non-tariff barriers on a gradual basis within a period of five years after the enjoyment of concessions applicable to those products.

B. Foreign Exchange Restrictions

Member States shall make exceptions to their foreign exchange restrictions relating to payments for the products under the CEPT Scheme, as well as repatriation of such payments without prejudice to their rights under Article XVIII of the General Agreement on Tariff and Trade (GATT) and relevant provisions of the Articles of Agreement of the International Monetary Fund (IMF).

C. Other Areas of Cooperation

Member States shall explore further measures on border and non-border areas of cooperation to supplement and complement the liberalisation of trade. These may include, among others, the harmonisation of standards, reciprocal recognition of tests and certification of products, removal of barriers to foreign investments, macroeconomic consultations, rules for fair competition, and promotion of venture capital.

D. Maintenance of Concessions

Member States shall not nullify or impair any of the concessions as agreed upon through the application of methods of customs valuation, any new charges or measures restricting trade, except in cases provided for in this Agreement.

ARTICLE 6 : EMERGENCY MEASURES

1 . If, as a result of the implementation of this Agreement, import of a particular product eligible under the CEPT Scheme is increasing in such a manner as to cause or threaten to cause serious injury to sectors producing like or directly competitive products in the importing Member States, the importing Member States may, to the extent and for such time as may be necessary to prevent or to remedy such injury, suspend preferences provisionally and without discrimination, subject to Article 6 (3) of this Agreement. Such suspension of preferences shall be consistent with the GATT.

2. Without prejudice to existing international obligations, a Member State, which finds it necessary to create or intensify quantitative restrictions or other measures limiting imports with a view to forestalling the threat of or stopping a serious decline of its monetary reserves, shall endeavour to do so in a manner, which safeguards the value of the concessions agreed upon.

3. Where emergency measures are taken pursuant to this Article, immediate notice of such action shall be given to the Council referred to in Article 7 of this Agreement, and such action may be the subject of consultation as provided for in Article 8 of this Agreement.

ARTICLE 7 : INSTITUITIONAL ARRANGEMENTS

1. The ASEAN Economic Ministers (AEM) shall, for the purposes of this Agreement, establish a ministerial-level Council comprising one nominee from each Member State and the Secretary-General of the ASEAN Secretariat. The ASEAN Secretariat shall provide the support to the ministerial-level Council for supervising, coordinating and reviewing the implementation of this Agreement, and assisting the AEM in all matters relating thereto. In the performance of its functions, the ministerial-level Council shall also be supported by the Senior Economic Officials' Meeting (SEOM).

2. Member States which enter into bilateral arrangements on tariff reductions pursuant to Article 4 of this Agreement shall notify all other Member States and the ASEAN Secretariat of such arrangements.

3. The ASEAN Secretariat shall monitor and report to the SEOM on the implementation of the Agreement pursuant to the Article III (2) (8) of the Agreement on the Establishment of the ASEAN Secretariat. Member States shall cooperate with the ASEAN Secretariat in the performance of its duties.

ARTICLE 8 : 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 of this Agreement. The Council referred to in Article 7 of this Agreement, may seek guidance from the AEM in respect of any matter for which it has not been possible to find a satisfactory solution during previous consultations.

2. Member States, which consider that any other Member State has not carried out its obligations under this Agreement, resulting in the nullifications or impairment of any benefit accruing to them, may, with a view to achieving satisfactory adjustment of the matter, make representations or proposal to the other Member States concerned, which shall give due consideration to the representations or proposal made to it.

3. Any differences between the Member States concerning the interpretation or application of this Agreement shall, as far as possible, be settled amicably between the parties. If such differences cannot be settled amicably, it shall be submitted to the Council referred to in Article 7 of this Agreement, and if necessary, to the AEM.

ARTICLE 9 : GENERAL EXCEPTIONS

Nothing in this Agreement shall prevent any Member State from taking action and adopting measures, which it considers necessary for the protection of its national security, the protection of public morals, the protection of human, animal or plant life and health, and the protection of articles of artistic, historic and archaeological value.

ARTICLE 10 : FINAL PROVISIONS

1. The respective Governments of Member States shall undertake the appropriate measures to fulfill the agreed obligations arising from this Agreement.

2. Any amendment to this Agreement shall be made by consensus and shall become effective upon acceptance by all Member States.

3. This Agreement shall be effective upon signing.

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

5. No reservation shall be made with respect to any of the provisions of this Agreement. In witness Whereof, the undersigned, being duly authorised thereto by their respective Governments, have signed this Agreement on Common Effective Preferential Tariff (CEPT) Scheme for the Free Trade Area (AFTA).

Done at Singapore, this 28th day of January, 1992 in a single copy in the English Language.

Annex 3

PROTOCOL TO AMEND THE AGREEMENT ON THE COMMON EFFECTIVE PREFERENTIAL TARIFF SCHEME FOR THE ASEAN FREE TRADE AREA

The Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia,the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand, Member States of the Association of South East Asian Nations (ASEAN);

NOTING the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA) ("the Agreement") signed in Singapore on 28 January 1992;

RECALLING the Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation (1992) signed on 15 December 1995 in Bangkok by the Heads of Government reflecting the acceleration of the CEPT Scheme for AFTA from the year 2008 to the year 2003;

RECOGNISING the need to amend the Agreement to reflect the latest developments in ASEAN;

HAVE AGREED AS FOLLOWS:

ARTICLE 1

Article 2, paragraphs 3,5 and 6 of the Agreement be amended to read as follows:

"3. Exclusions at the HS 8/9 digit level for specific products are permitted for those Member States, which are temporarily not ready to include such products in the CEPT Scheme. For specific products, which are sensitive to a Member State, pursuant to Article 1 (3) of the Framework Agreement on Enhancing ASEAN Economic Cooperation, a Member State may exclude products from the CEPT Scheme, subject to a waiver of any concession herein provided for such products. These temporarily excluded products are to be gradually included into the CEPT by 1 January 2000.

5. All manufactured products, including capital goods, and agricultural products shall be in the CEPT Scheme. These products shall automatically be subject to the schedule of tariff reduction set out in Article 4 of the Agreement as revised in Article 3 of this Protocol. In respect of PTA items, the schedule of tariff reduction provided for in the revised Article 4(A) set out in Article 3 of this Protocol shall be applied,taking into account the tariff rate after the application of tile existing margin of preference (MOP) as at 31 December 1992.

6. All products under the PTA which are not in the list for tariff reductions of the CEPT Scheme shall continue to enjoy the MOPs existing as at 31 December 1992.".

ARTICLE 2

Article 3 of the Agreement be amended to read as follows:

"This Agreement shall apply to all manufactured products including capital goods, and agricultural products.".

ARTICLE 3

Article 4 of the Agreement be substituted with the following:

"Schedule of Tariff Reduction and Enjoyment of concessions

A. Schedule of Tariff Reduction

1 . Member States agree to the following schedule of effective preferential tariff reductions:

a. The reduction from existing tariff rates to 20% shall be completed within a time frame of 5 years, from 1 January 1993, subject to a programme of reduction to be decided by each Member State, which shall be announced at the start of the programme. Member States are encouraged to adopt an annual rate of reduction, which shall be (X-20)%/5, where X equals the existing tariff rates of individual Member States.

b. The subsequent reduction of tariff rates from 20% or below shall be completed within a time frame of 5 years. The rate of reduction shall be at a minimum of 5% quantum per reduction. A programme of reduction to be decided by each Member State shall be announced at the start of the programme.

c. For products with existing tariff rates of 20% or below as at 1 January 1993, Member States shall decide upon a programme of tariff reductions, and announce at the start, the schedule of tariff reductions.

2. The above schedules of tariff reduction shall not prevent Member States from immediately reducing their tariffs to O%-5% or following an accelerated schedule of tariff reduction.

B. Enjoyment of Concessions

Subject to Articles 4(A) (1 b) and 4(A) (1 c) of the Agreement, products which reach, or are at tariff rates of 20% or below, shall automatically enjoy the concessions.".

ARTICLE 4

The following be inserted after Article 9 as a new Article 9A to the Agreement:

"Accession of New Members

New Members of ASEAN shall accede to this Agreement on terms and conditions, which are consistent with the Framework Agreement on Enhancing ASEAN Economic Cooperation (1992) and the Agreement, and which have been agreed between them and the existing Members of ASEAN.".

ARTICLE 5

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 not later than 1 January 1996.

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 WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed the Protocol to Amend the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA).

DONE at **Bangkok,** this **15th day of December 1995** in a single copy in the English Language.

Annex 4

PROTOCOL
TO AMEND THE AGREEMENT ON
ASEAN PREFERENTIAL TRADING ARRANGEMENTS

The Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand, Member States of the Association of South East Asian Nations (ASEAN);

NOTING the Agreement on ASEAN Preferential Trading Arrangements (PTA)signed in Manila on 24 February 1 977;

RECALLING the decision of the Sixth ASEAN Free Trade Area (AFTA) Council in Phuket, Thailand on 27 April 1995 to phase in all PTA products into the CEPT Scheme;

DESIRING to amend the Rules of Origin and its Operational Certification Procedures in the Agreement on ASEAN Preferential Trading Arrangements in accordance with Article 1 7 (3) of the Agreement which provides for the amendment to the Agreement, so as to implement this decision;

HAVE AGREED AS FOLLOWS:

Annex 1 of the Agreement on "Rules of Origin for the ASEAN Preferential Trading Arrangements", previously amended by the Protocol on Improvements on Extension of Tariff Preferences under the ASEAN Preferential Trading Arrangements signed in Manila on 15 December 1987, and the "Operational Certification Procedures for the Rules of Origin of the ASEAN Preferential Trading Arrangements" shall be substituted with the "Rules of Origin for the Common Effective Preferential Tariff (CEPT)" Scheme for the ASEAN Free Trade Area and the "Operational Certification Procedures for the Rules of Origin of the ASEAN Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area" set out in ANNEX 1 and ANNEX 2 respectively which shall form an integral part of this Protocol.

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 not later than 1 January 1996.

This Protocol shall be deposited with the Secretary-General of ASEAN, who shall promptly furnish certified copies thereof to all Member Countries.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed the Protocol to Amend the Agreement on ASEAN Preferential Trading Arrangements.

DONE at **Bangkok**, this **15th day of December 1995** in a single copy in the English Language.

Annex 5

ASEAN Framework Agreement on Services

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, Member States of the Association of South East Asian Nations (hereinafter referred to as "ASEAN");

RECOGNISING the Singapore Declaration of 1992 which provides that ASEAN shall move towards a higher plane of economic cooperation to secure regional peace and prosperity;

RECALLING that the Heads of Government, at the Fourth Summit held in Singapore on 27-28 January 1992 declared that an ASEAN Free Trade Area (AFTA) shall be established in the region;

NOTING that the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Singapore on 28 January 1992 provides that ASEAN Member States shall explore further measures on border and non-border areas of cooperation to supplement and complement the liberalisation of trade;

RECOGNISING that intra-ASEAN economic cooperation will secure a liberal trading framework for trade in services which would strengthen and enhance trade in services among ASEAN Member States;

DESIRING to mobilise the private sector in the realisation of economic development of ASEAN Member States in order to improve the efficiency and competitiveness of their service industry sector;

REITERATING their commitments to the rules and principles of the General Agreement on Trade in Services (hereinafter referred to as "GATS") and noting that Article V of GATS permits the liberalising of trade in services between or among the parties to an economic integration agreement;

AFFIRMING that ASEAN Member States shall extend to one another preference in trade in services;

HAVE AGREED AS FOLLOWS:

Article I : Objectives

The objectives of the Member States under the ASEAN Framework Agreement on Services (hereinafter referred to as "this Framework Agreement") are:

(a) to enhance cooperation in services amongst Member States in order to improve the efficiency and competitiveness, diversify production capacity and supply and distribution of services of their service suppliers within and outside ASEAN;

(b) to eliminate substantially restrictions to trade in services amongst Member States; and

(c) to liberalise trade in services by expanding the depth and scope of liberalisation beyond those undertaken by Member States under the GATS with the aim to realising a free trade area in services.

Article II : Areas of Cooperation

1 . All Member States shall participate in the cooperation arrangements under this Framework Agreement. However, taking cognizance of paragraph 3 of Article I of this Framework Agreement on Enhancing ASEAN Economic Cooperation, two or more Member States may proceed first if other Member States are not ready to implement these arrangements.

2. Member States shall strengthen and enhance existing cooperation efforts in service sectors and

develop cooperation in sectors that are not covered by existing cooperation arrangements, through inter alia:

(a) establishing or improving infrastructural facilities;

(b) joint production, marketing and purchasing arrangements;

(c) research and development; and

(d) exchange of information.

3. Member States shall identify sectors for cooperation and formulate Action Plans, Programmes and Understandings that shall provide details on the nature and extent of cooperation.

Article III : Liberalisation

Pursuant to Article 1 (c), Member States shall liberalise trade in services in a substantial number of sectors within a reasonable time-frame by:

(a) eliminating substantially all existing discriminatory measures and market access limitations amongst Member States; and

(b) prohibiting new or more discriminatory measures and market access limitations.

Article IV : Negotiation of Specific Commitments

1. Member States shall enter into negotiations on measures affecting trade in specific service sectors. Such negotiations shall be directed towards achieving commitments which are beyond those inscribed in each Member State's schedule of specific commitments under the GATS and for which Member States shall accord preferential treatment to one another on an MFN basis.

2. Each Member State shall set out in a schedule, the specific commitments it shall undertake under paragraph 1 .

3. The provisions of this Framework Agreement shall not be so construed as to prevent any Member State from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

Article V : Mutual Recognition

1 . Each Member State may recognise the education or experience obtained,requirements met, or licenses or certifications granted in another Member State, for the purpose of licensing or certification of service suppliers. Such recognition may be based upon an agreement or arrangement with the Member State concerned or may be accorded autonomously.

2. Nothing in paragraph 1 shall be so construed as to require any Member State to accept or to enter into such mutual recognition agreements or arrangements.

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1. These agreements or arrangements are concluded for Member State only. In the event a Member

State wishes to join such agreements or arrangements, it should be given equal opportunity to do at any time.

Article VI : Denial of Benefits

The benefits of this Framework Agreement shall be denied to a service supplier who is a natural person of a non-Member State or a juridical person owned or controlled by persons of a non-Member State constituted under the laws of a Member State, but not engaged in substantive business operations in the territory of Member State(s)

Article VII : Settlement of Disputes

1 . The Protocol on Dispute Settlement Mechanism for ASEAN shall generally be referred to and applied with respect to any disputes arising from, or any differences between Member States concerning the interpretation or application of, this Framework Agreement or any arrangements arising therefrom.

2. A specific dispute settlement mechanism may be established for the purposes of this Framework Agreement which shall form an integral part of this Framework Agreement.

Article VIII : Supplementary Agreements or Arrangements

Schedules of specific commitments and Understandings arising from subsequent negotiations under this Framework Agreement and any other agreements or arrangements, Action Plans and Programmes arising thereunder shall form an integral part of this Framework Agreement.

Article IX : Other Agreements

1 . This Framework Agreement or any action taken under it shall not affect the rights and obligations of the Member States under any existing agreements2 to which they are parties.

2. Nothing in this Framework Agreement shall affect the rights of the Member States to enter into other agreements not contrary to the principles, objectives and terms of this Framework Agreement.

3. Upon the signing of this Framework Agreement, Member States shall promptly notify the ASEAN Secretariat of any agreements pertaining to or affecting trade in services to which that Member is a signatory.

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2. Existing Agreements are not affected as these have been notified in the MFN Exemption List of the GATS.

Article X : Modification of Schedules of Specific Commitments

1 . A Member State may modify or withdraw any commitment in its schedule of specific commitments, at any time after three years from the date on which that commitment entered into force provided:

(a) that it notifies other Member States and the ASEAN Secretariat of the intent to modify or withdraw a commitment three months before the intended date of implementation of the modification or withdrawal; and

(b) that it enters into negotiations with an affected Member State to agree to necessary compensatory adjustment.

2. In achieving a compensatory adjustment, Member States shall ensure that the general level of mutually advantageous commitment is not less favourable to trade than that provided for in the schedules of specific commitments prior to such negotiations.

3. Compensatory adjustment shall be made on an MFN basis to all other Member States.

4. The SEOM with the endorsement of the AEM may draw up additional procedures to give effect to this Article.

Article XI : Institutional Arrangements

1 . The SEOM shall carry out such functions to facilitate the operation of this Framework Agreement and further its objectives, including the Organisation of the conduct of negotiations, review and supervision of the implementation of this Framework Agreement.

2. The ASEAN Secretariat shall assist SEOM in carrying out its functions, including providing the support for supervising, coordinating and reviewing the implementation of this Framework Agreement.

Article XII : Amendments

The provisions of this Framework Agreement may be amended through the consent of all the Member States and such amendments shall become effective upon acceptance by all Member States.

Article XIII : Accession of New Members

New Members of ASEAN shall accede to this Framework Agreement on terms and conditions agreed between them and signatories to this Framework Agreement.

Article XIV : Final Provision

1 . The terms and definitions and other provisions of the GATS shall be referred to and applied to matters arising under this Framework Agreement for which no specific provision has been made under it.

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

3. This Framework Agreement shall enter into force upon the deposit of instruments of ratification or acceptance by all signatory governments with the Secretary-General of ASEAN.

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

DONE at **Bangkok**, this **15th day of December 1995** in a single copy in the English Language.

Annex 6

ASEAN FRAMEWORK AGREEMENT ON INTELLECTUAL PROPERTY COOPERATION

Bangkok, 15 December 1995

The Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of 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 (hereinafter referred to as "ASEAN");

RECOGNISING the important role of intellectual property rights in the conduct of trade and the flow of investment among the Member States of ASEAN and the importance of cooperation in intellectual property in the region;

DESIRING to foster closer cooperation in the field of intellectual property and related fields in order to provide a firm basis for economic progress, the expeditious realization of the ASEAN Free Trade Area and prosperity among the Member States of ASEAN;

RECOGNISING the need to promote closer cooperation and understanding among the countries in the region in the field of intellectual property and related fields to contribute to regional dynamism, synergy and growth;

HAVE AGREED AS FOLLOWS:

Article 1 : Objectives

1 . Member States shall strengthen their cooperation in the field of intellectual property through an open and outward looking attitude with a view to contributing to the promotion and growth of regional and global trade liberalisation.

2. Member States shall promote cooperation in the field of intellectual property among government agencies as well as among the private sectors and professional bodies of ASEAN.

3. Member States shall explore appropriate intra-ASEAN cooperation arrangements in the field of intellectual property, contributing to the enhancement of ASEAN solidarity as well as to the promotion of technological innovation and the transfer and dissemination of technology.

4. Member States shall explore the possibility of setting up of an ASEAN patent system, including an ASEAN Patent Office, if feasible, to promote the region-wide protection of patent bearing in mind developments on regional and international protection of patent.

5. Member States shall explore the possibility of setting up of an ASEAN trademark system, including an ASEAN Trademark Office, if feasible, to promote the region-wide protection of trademark bearing in mind developments on regional and international protection of trademarks.

6. Member States shall have consultations on the development of their intellectual property regimes with a view to creating ASEAN standards and practices which are consistent with international standards.

Article 2 : Principles

1 . Member States shall abide by the principle of mutual benefits in the implementation of measures or initiatives aimed at enhancing ASEAN intellectual property cooperation.

2. Member States, being mindful of the international conventions on intellectual property rights to which they are parties, and the international obligations assumed under the provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights, shall implement intra-ASEAN intellectual property arrangements in a manner in line with the objectives, principles, and norms set out in such relevant conventions and the Agreement on TRIPS.

3. Member States shall strive to implement intra-ASEAN intellectual property cooperation arrangements which are beneficial to creators, producers and users of intellectual property and in a manner conducive to social and economic welfare.

4. Member States shall recognise and respect the protection and enforcement of intellectual property rights in each Member State and the adoption of measures necessary for the protection of public health and nutrition and the promotion of the public interests in sectors of vital importance to the Member State's socio economic and technological development, which are consistent with their international obligations.

5. Member States are conscious of and understand the necessity for each Member State to adopt appropriate measures to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain-trade or adversely affect the international transfer of technology.

Article 3 : Scope of Cooperation

1 . Cooperation shall include, inter alia, the fields of copyright and related rights, patents, trademarks, industrial designs, geographical indications, undisclosed information and lay-out designs of integrated circuits.

2. Cooperative activities under this Agreement shall aim, among others, to strengthen ASEAN intellectual property administration; to enhance ASEAN cooperation in intellectual property enforcement and protection; and to explore the possibility of setting up the ASEAN patent and trademark systems.

3. Cooperative activities under this Agreement shall include, inter alia;

3.1 Activities to enhance intellectual property enforcement and protection:

a. Effective protection and enforcement of intellectual property rights;

b. Cross border measures cooperation;

c. Networking of judicial authorities and intellectual property enforcement agencies. .

3.2 Activities to strengthen ASEAN intellectual property administration such as:

a. automation to improve the administration of intellectual property; and

b. the creation of an ASEAN database on intellectual property registration.

3.3 Activities to strengthen intellectual property legislation such as:

a. comparative study of the procedures, practices and administration of ASEAN intellectual property offices; and

b . activities related to the implementation of the TRIPS Agreement and other

recognised international intellectual property conventions.

3.4 Activities to promote human resources development such as:

a. Networking of intellectual property training facilities or centres of excellence on intellectual property and to explore the possibility of establishing a regional training institute for intellectual property or other appropriate structures; and

b. Exchange of intellectual property personnel and experts.

3.5 Activities to promote public awareness of intellectual property rights.

3.6 Activities to promote private sector cooperation in intellectual property such as to explore the possibility of :

a. The establishment of an ASEAN Intellectual Property Association; and

b. Providing arbitration services or other alternative disputere solution mechanisms for the resolution of intellectual property disputes.

3.7 Information exchange on intellectual property issues.

3.8 Other cooperative activities as determined by Member States.

4. Details and the modalities to implement the cooperative activities are to be formulated in the form of a program of action on intellectual property under this framework Agreement.

Article 4 : Review of Cooperative Activities

An ASEAN mechanism shall be established, comprising representatives from Member States, to review the cooperative activities under this Agreement. It shall meet on a regular basis to review the progress of the cooperative activities and any arrangement arising therefrom and to submit its findings and recommendations to the ASEAN Senior Economic Officials Meeting (SEOM). The ASEAN Secretariat shall give necessary secretariat support to the mechanism.

Article 5 : Consultations

1. Any differences between the member States concerning the interpretation or application of this Agreement shall, as far as possible, be settled amicably between the parties.

2. Member States shall accord adequate opportunity for consultations regarding any representations made by other Member States in relation to the differences between them. If such differences cannot be settled amicably, they shall be dealt with by the SEOM and finally by the ASEAN Economic Ministers Meeting.

Article 6 : General Provisions

Nothing in this Agreement shall prejudice any existing or future bilateral or multilateral agreement entered into by any Member State or the national laws of each Member State relating to the protection and enforcement of intellectual property rights.

Article 7 : Funding

Activities under this Agreement will be subject to the availability of funds. Expenses incurred as a result of any activity undertaken by a Member State to fulfil the objectives of this Agreement shall be borne by the Member State concerned unless all Member States decide otherwise.

Article 8 : Final Provisions

1. The respective Governments of Member States shall undertake the appropriate measures to fulfil the agreed obligations arising from this Agreement.

2. Any amendment to this Agreement shall be made by consensus and shall become effective upon acceptance by all Member States.

3. No reservation shall be made with respect to any of the provisions of this Agreement.

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

5. 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.

IN WITNESS WHEREOF, the undersigned, being duly authorised by their respective Governments, have signed this ASEAN Framework Agreement on Intellectual Property Cooperation.

DONE at **Bangkok**, this **15th day of December 1995** in a single copy in the English Language.

Annex 7

Basic Agreement on the ASEAN Industrial Cooperation Scheme

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, Member States of the Association of South East Asian Nations (ASEAN);

REAFFIRMING their desire to collaborate for the acceleration of economic growth in the region to promote greater industrialisation of their economies, to expand their trade and investment and to improve the economic infrastructure for the mutual benefit of their people;

MINDFUL of the rapid development in the international economic environment and the need to maintain ASEAN's attractiveness and competitiveness as an investment region;

RECOGNIZING that the liberalization of trade and investment in ASEAN Countries can support meaningful industrial cooperation which can greatly contribute to strengthening and broadening the base of their industrial sector;

CONVINCED that ASEAN industrial cooperation will increase intra-ASEAN investment and investment from non-ASEAN sources;

CONVINCED ALSO that the sharing of resources will foster closer ASEAN economic integration as well as enhance the technology base, economies of scale and scope, and the competitiveness of ASEAN industries;

NOTING the proposal by the ASEAN Chambers of Commerce and Industry (ASEAN-CCI) on the ASEAN industrial cooperation scheme and the confidence expressed by the ASEAN-CCI in the viability of the scheme;

DESIRING to provide the guidelines and institutional framework within which the ASEAN private sector may collaborate on the basis of mutual and equitable benefits for the ASEAN Member Countries and increased industrial production for the region as a whole;

MINDFUL of the need to develop the growth of Small and Medium Scale Enterprises (SMEs) taking into consideration the stages of development among ASEAN Member Countries;

ADHERING to the principles, concepts and ideals of the Framework Agreement on Enhancing ASEAN Economic Cooperation and the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area;

DO HEREBY AGREE to pursue the ASEAN Industrial Cooperation Scheme as stipulated by the following provisions:

ARTICLE 1
DEFINITIONS

For the purposes of this Agreement :

1. "AICO Scheme" shall mean the ASEAN Industrial Cooperation Scheme established by this Agreement.
2. "AICO Arrangement" shall mean a cooperative arrangement consisting of a minimum of two Participating Countries and one Participating Company in each Participating Country.
3. "Participating Countries" shall mean ASEAN Member Countries which agree to participate in an AICO Arrangement by granting the specified privileges to the Participating Companies.
4. "Participating Companies" shall mean companies incorporated and operating in ASEAN Member Countries meeting the criteria under Article 2(1) and Article 3 of this Agreement.
5. "AICO Products" refer to the following:
   a. AICO Final Products shall be the final output which does not undergo any further processing within the specific AICO arrangement; or
   b. AICO Intermediate Products shall be products used within the AICO arrangement as an input to the AICO Final Product; or
   c. AICO Raw Materials shall be used as input to an intermediate product or as direct input to the AICO Final Product;which shall be reflected in the Certificate of Eligibility (COE) issued to the Participating Companies.

6. "Preferential Tariff Rates" shall mean the advanced CEPT rates fixed by Participating Countries within the range of 0% to 5%.
7. "National Authorities" shall mean the relevant authorities of ASEAN Member Countries responsible for the approval of an AICO application and the granting of privileges.

ARTICLE 2
GENERAL PROVISIONS

1. The AICO Arrangement shall be made up of Participating Companies incorporated and operating in different ASEAN Member Countries which seek to cooperate in the manufacture of AICO Products.
2. The number of Participating Companies in an AICO Arrangement may change subject to the defined minimum level.
3. An AICO Arrangement may have more than one Participating Company in each of the Participating Countries and may cover multiple products.

ARTICLE 3
ELIGIBILITY CRITERIA

1. Companies wishing to benefit from the privileges of the AICO Scheme shall fulfill the following criteria:
   a. be incorporated and operating in an ASEAN Member Country;
   b. have a minimum of 30% national equity. The equity condition may be waived after consultation by the Participating Countries in cases where the proposing companies meet the other criteria of this Article; and
   c. undertake resource sharing, industrial complementation or industrial cooperation activities.

2. Each Participating Company of an AICO Arrangement must submit documentary evidence on resource sharing, industrial complementation or industrial cooperation activities such as joint ventures, joint manufacturing, technology transfer, training, licensing, consolidated purchasing and procurement, management service, sales and marketing agreement or other areas of cooperation.

ARTICLE 4
PRODUCT COVERAGE AND ELIGIBILITY

1. All products, other than products listed in Article 9 (General Exception) of the Agreement of the CEPT Scheme, shall be eligible for the AICO Scheme.
2. Product approval shall be at HS 8-digit level and above.
3. An AICO Product shall meet the Rules of Origin of the CEPT Scheme.

ARTICLE 5
PRIVILEGES

1. A Participating Company shall be entitled to the following privileges under the AICO Scheme: a. approved AICO Products traded between Participating Companies shall enjoy preferential tariff rates of 0%-5%, the actual rate of which shall be determined by each Participating Country. The preferential tariff shall cease when the tariff rate of the product reaches the final CEPT rate; b. local content accreditation shall be accorded, where applicable, to products manufactured by Participating Companies; and c. non-tariff incentives offered by the respective National Authorities. The granting of these incentives shall be based on the fulfillment of the requirements of the respective Participating Country.
2. ASEAN Member Countries may subsequently introduce additional tariff and non-tariff incentives under this Agreement.

ARTICLE 6
OPERATING GUIDELINES AND AWARD PRINCIPLES

1. An AICO Arrangement shall only require the approval of the Participating Countries.
2. A Participating Company shall be accorded the privileges under this Agreement upon the approval of its application in accordance with the provisions of Article 7.
3. The approval of an AICO Arrangement shall not be limited to the initial applicants manufacturing a particular AICO Product. Subsequent applications from companies manufacturing the same AICO Products shall also be approved once the companies meet the eligibility criteria.
4. A prospective company in a non-participating Member Country could participate in an on-going AICO Arrangement if the non-participating country agrees to extend the preferential tariff rates to the AICO Products and upon the agreement of the existing Participating Countries.
5. A Participating Company shall use the intermediate parts and raw materials only in the manufacture of AICO Products. A Participating Country may withdraw the privileges under this Agreement if a Participating Company violates this obligation.

ARTICLE 7
APPLICATION PROCEDURES

1. Interested companies wishing to participate in an AICO Arrangement shall apply directly to the National Authorities for approval.
2. ASEAN Member Countries shall inform the ASEAN Secretariat of their participation in an AICO Arrangement and the tariff rate to be applied within the 0%-5% band, within 60 days of receipt of the application. ASEAN Member Countries which are unable to indicate a decision on the tariff rate within this period shall nevertheless indicate their decision on acceptance or otherwise, of the arrangement and the product as an AICO Product.
3. The ASEAN Secretariat shall issue the COE within 14 days of the receipt of approval from Participating Countries.
4. The Participating Company shall use the COE to claim preferential tariff rates and to apply for non-tariff incentives from the relevant National Authorities.
5. Participating Countries shall grant the Preferential Tariff Rates within 60 days from the date of the issuance of the COE by the ASEAN Secretariat.

ARTICLE 8
MONITORING BODY

1. National Authorities shall monitor the implementation of their respective AICO Arrangements. The ASEAN Secretariat shall be responsible for the overall monitoring of the AICO Scheme. For this purpose, Participating Countries shall submit regular reports on the AICO Arrangements in their respective countries to the ASEAN Secretariat.
2. The ASEAN Economic Ministers (AEM) Meeting and its subsidiary bodies shall review the progress and implementation of the AICO Scheme.

ARTICLE 9
SETTLEMENT OF DISPUTE

Any differences between the ASEAN Member Countries concerning the interpretation or application of this Agreement shall, as far as possible, be settled amicably between the parties. If such differences cannot be settled amicably, it shall be submitted to the Dispute Settlement Mechanism.

ARTICLE 10
ACCESSION OF NEW MEMBERS

New Members of ASEAN shall accede to this Agreement by signing and depositing the instrument of ratification with the Secretary General of ASEAN.

ARTICLE 11
OTHER PROVISIONS

1. The scope of coverage of this Agreement shall subsequently be expanded to include additional sectors.
2. Participating Countries shall eliminate all quantitative restrictions and non-tariff barriers applicable to an approved AICO product.

ARTICLE 12
REPEALING PROVISION

Upon the entry into force, this Agreement shall supersede the Basic Agreement on ASEAN Industrial Joint Ventures (AIJVs) dated 15 December 1987 and the Memorandum of Understanding on the Brand-to-Brand Complementation (BBC) Scheme dated 18 October 1988 subject to the following conditions:

a. that BBC and AIJV applications shall not be accepted upon entry into force of this Agreement;
b. only amendments to approved models in the BBC Scheme shall be allowed;
c. that existing BBC companies shall continue to enjoy the margin of preference and the local content accreditation for products approved to this date until the expiry of the current car model previously approved; and
d. for existing AIJVs, the privileges shall cease on 31 December 2002. With effect from 1 January 2003 the final CEPT rate shall apply.

ARTICLE 13
FINAL PROVISIONS

1. The respective Governments of ASEAN Member Countries shall undertake the appropriate measures to fulfill the obligations arising from this Agreement;

2. Any amendment to this Agreement shall be made by consensus and shall become effective upon acceptance by all ASEAN Member Countries.
3. No reservation shall be made with respect to any of the provisions of this Agreement;
4. This Agreement shall be deposited with the Secretary General of ASEAN who shall promptly furnish a certified copy thereof to each ASEAN Member Country; and
5. 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.

IN WITNESS HEREOF, the undersigned have signed this Agreement on ASEAN Industrial Cooperation Scheme.

DONE at **Singapore**, this **27th** day of **April 1996** in a single copy in the English Language.

Annex 8

Protocol on Dispute Settlement Mechanism

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, Member States of the Association of South East Asian Nations (ASEAN);

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");

RECOGNIZING the need to expand Article 9 of the Agreement to strengthen the mechanism for the settlement of disputes in the area of ASEAN economic cooperation;

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 1 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 the Senior Economic Officials Meeting ("SEOM") has made a ruling on the panel report.

ARTICLE 2
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. 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 no more than thirty (30) days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.

ARTICLE 3
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 to raise the matter to SEOM.
2. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the dispute proceeds.

ARTICLE 4
Senior Economic Officials Meeting

1. If the consultations fail to settle a dispute within sixty (60) days after the date of receipt of the request for consultations, the matter shall be raised to the SEOM.
2. The SEOM shall:
    a) establish a panel; or

b) where applicable, raise the matter to the special body in charge of the special or additional rules and procedures for its consideration.

3. Notwithstanding Article 4 paragraph 2, if the SEOM considers it desirable to do so in a particular case, it may decide to deal with the dispute to achieve an amicable settlement without appointing a panel. This step shall be taken without any extension of the thirty (30)-day period in Article 5 paragraph 2.

ARTICLE 5

Establishment of Panel

1. 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 agreement, and make such other findings as will assist the SEOM in making the rulings provided for under the Agreement or any covered agreement.
2. The SEOM shall establish a panel no later than thirty (30) days after the date on which the dispute has been raised to it.
3. The SEOM shall make the final determination of the size, composition and terms of reference of the panel.

ARTICLE 6

Function of the Panel

1. The panel shall, apart from the matters covered in Appendix 2, regulate its own procedures in relation to the rights of parties to be heard and its deliberations.
2. The panel shall submit its findings to the SEOM within sixty (60) days of its formation. In exceptional cases, the panel may take an additional ten (10) days to submit its findings to SEOM. Within this time period, the panel shall accord adequate opportunity to the parties to the dispute to review the report before submission.
3. The panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. A Member State should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.
4. 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 7

Treatment of Panel Result

The SEOM shall consider the report of the panel in its deliberations and make a ruling on the dispute within thirty (30) days from the submission of the report by the panel. In exceptional cases, SEOM may take an additional ten (10) days to make a ruling on the dispute. SEOM representatives from Member States which are parties to a dispute can be present during the process of deliberation but shall not participate in the ruling of SEOM. SEOM shall make a ruling based on simple majority.

ARTICLE 8

Appeal

1. Member States, who are parties to the dispute, may appeal the ruling by the SEOM to the ASEAN Economic Ministers ("AEM") within thirty (30) days of the ruling.
2. The AEM shall make a decision within thirty (30) days of the appeal. In exceptional cases, AEM may take an additional ten (10) days to make a decision on the dispute. Economic Ministers from Member States which are parties to a dispute can be present during the process of deliberation but shall not participate in the decision of AEM. AEM shall make a decision based on simple majority. The decision of the AEM on the appeal shall be final and binding on all parties to the dispute.
3. Since prompt compliance with the rulings of the SEOM or decisions of the AEM is essential in order to ensure effective resolution of disputes, Member States who are parties to the dispute shall comply with the ruling or decision, as the case may be, within a reasonable time period. The reasonable period of time shall be a period of time mutually agreed to by the parties to the dispute but under no circumstances should it exceed thirty (30) days from the SEOM's ruling or in the event of an appeal thirty (30) days from the AEM's decision. The Member States concerned shall provide the SEOM or the AEM, as the case may be, with a status report in writing of their progress in the implementation of the ruling or decision.

ARTICLE 9

Compensation and the Suspension of Concessions

1. If the Member State concerned fails to bring the measure found to be inconsistent with the Agreement or any covered agreement into compliance therewith or otherwise comply with SEOM's rulings or AEM's decisions within the reasonable period of time, such Member State shall, if so requested, and no later than the expiry of the reasonable period of time, 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 20 (twenty) days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the AEM to suspend the application to the Member State concerned of concessions or other obligations under the Agreement or any covered agreements.
2. 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 Agreement or any covered agreements.

ARTICLE 10

Maximum Time-Frame

Member States agree that the total period for the disposal of a dispute pursuant to Articles 2, 4, 5, 6, 7, 8 and 9 of this Protocol shall not exceed two hundred and ninety (290) days.

ARTICLE 11

Responsibilities of the Secretariat

1. The ASEAN Secretariat shall have the responsibility of assisting the panels, especially on the historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.
2. The ASEAN Secretariat shall have the responsibility of monitoring and maintaining under surveillance the implementation of the SEOM's ruling and AEM's decision as the case may be.
3. The ASEAN Secretariat may offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

ARTICLE 12

Final Provisions

1. This Protocol shall be deposited with the Secretary-General of ASEAN who shall promptly furnish a certified copy thereof to each Member State.
2. 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.

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

DONE at Manila, this 20th day of November 1996 in a single copy in the English Language.

For the Government of Brunei Darussalam :
(signed)

ABDUL RAHMAN TAIB
Minister of Industry and Primary Resources

For the Government of the Republic of Indonesia:
(signed)

T. ARIWIBOWO
Minister of Industry and Trade

For the Government of Malaysia:
(signed)

RAFIDAH AZIZ
Minister of International Trade and Industry

For the Government of the Republic of the Philippines :
(signed)

CESAR B. BAUTISTA
Secretary of Trade and Industry

For the Government of the Republic of Singapore:

(signed)

YEO CHEOW TONG
Minister for Trade and Industry

For the Government of the Kingdom of Thailand:
(signed)

SUKON KANCHANALAI
Deputy Minister of Commerce

For the Government of the Socialist Republic of Vietnam:
(signed)

LE VAN TRIET
Minister of Trade

APPENDIX 1
COVERED AGREEMENTS

1. Multilateral Agreement on Commercial Rights of Non-Scheduled Services among ASEAN, Manila, 13 March 1971.
2. Agreement on ASEAN Preferential Trading Arrangements, Manila, 24 February 1977.
3. Memorandum of Understanding on the ASEAN Swap Arrangements, Kuala Lumpur, 5 August 1977.
4. Supplementary Agreement to the Memorandum of Understanding on the ASEAN Swap Arrangement, Washington D.C., 26 September 1978.
5. Second Supplementary Agreement to the Memorandum of Understanding on the ASEAN Swap Arrangement, Denpasar, Bali, 9 September 1979.
6. Agreement on the ASEAN Food Security Reserve, New York, 4 October 1979.
7. Basic Agreement on ASEAN Industrial Projects, Kuala Lumpur, 6 March 1980.
8. Supplementary Agreement of the Basic Agreement on ASEAN Industrial Projects ASEAN Urea Project (Indonesia), Kuala Lumpur, 6 March 1980.
9. Supplementary Agreement of the Basic Agreement on ASEAN Industrial Projects ASEAN Urea Project (Malaysia), Kuala Lumpur, 6 March 1980.
10. Amendments to the Memorandum of Understanding on the ASEAN Swap Arrangement Colombo, Sri Lanka, 16 January 1981.
11. Basic Agreement on ASEAN Industrial Complementation, Manila, 18 June 1981.
12. Third Supplementary Agreement to the Memorandum of Understanding on the ASEAN Swap Arrangement, Bangkok, 4 February 1982.
13. ASEAN Ministerial Understanding on Plant Quarantine Ring, Kuala Lumpur, 8-9 October 1982.
14. ASEAN Ministerial Understanding on the Standardization of Import and Quarantine Regulation on Animal and Animal Products, Kuala Lumpur, 8-9 October 1982.
15. Protocol to Amend the Agreement on the ASEAN Food Security Reserve, Bangkok, 22 October 1982.
16. ASEAN Customs Code of Conduct, Jakarta, 18 March 1983.
17. ASEAN Ministerial Understanding on Fisheries Cooperation, Singapore, 20-22 October 1983.
18. Basic Agreement on ASEAN Industrial Joint Ventures, Jakarta, 7 November 1983.
19. ASEAN Ministerial Understanding on ASEAN Cooperation in Agricultural Cooperatives, Manila, 4-5 October 1984.
20. ASEAN Ministerial Understanding on Plant Pest Free Zone, Manila, 4-5 October 1984.
21. Agreement on ASEAN Energy Cooperation, Manila, 24 June 1986.
22. ASEAN Petroleum Security Agreement, Manila, 24 June 1986.
23. Agreement on the Preferential Shortlisting of ASEAN Contractors, Jakarta, 20 October 1986.
24. Supplementary Agreement to the Basic Agreement on ASEAN Industrial Joint Ventures, Singapore, 16 June 1987.
25. Fourth Supplementary Agreement to the Memorandum of Understanding on the ASEAN Swap Arrangement, Kathmandu, Nepal, 21 January 1987.

26. Protocol on Improvements on Extensions of Tariff Preferences under the ASEAN Preferential Trading Arrangement, Manila, 15 December 1987.
27. Memorandum of Understanding on Standstill and Rollback on Non-Tariff Barriers among ASEAN Countries, Manila, 15 December 1987.
28. Revised Basic Agreement on ASEAN Industrial Joint Ventures, Manila, 15 December 1987.
29. 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.
30. Protocol on Improvements on Extension of Tariff Preferences under the ASEAN Preferential Trading Arrangement, Manila, 15 December 1987.
31. Agreement on the Establishment of the ASEAN Tourism Information Centre, Kuala Lumpur, 26 September 1988.
32. Financial Regulations of the ASEAN Tourism Information Centre, Kuala Lumpur, 26 September 1988.
33. Memorandum of Understanding Brand-to-Brand Complementation on the Automotive Industry Under the Basic Agreement on ASEAN Industrial Complementation (BAAIC), Pattaya, Thailand, 18 October 1988.
34. Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, 1 January 1991.
35. Supplementary Agreement to the Basic Agreement on ASEAN industrial Projects - ASEAN Potash Mining Projects (Thailand), Kuala Lumpur, 20 July 1991.
36. Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, Singapore, 28 January 1992.
37. Second Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, Manila, 23 October 1992.
38. Ministerial Understanding on ASEAN Cooperation in Food, Agriculture and Forestry, Bandar Seri Begawan, 28-30 October 1993.
39. Memorandum of Understanding on ASEAN Cooperation and Joint Approaches in Agriculture and Forest Products Promotion Scheme, Langkawi, Malaysia, 1994.
40. Third Protocol to Amend the Revised Basic Agreement on ASEAN Industrial Joint Ventures, 2 March 1995.
41. Protocol to Amend the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), Bangkok, 15 December 1995.
42. Protocol to Amend the Agreement on ASEAN Preferential Trading Arrangements, Bangkok, 15 December 1995.
43. ASEAN Framework Agreement on Services, Bangkok, 15 December 1995.
44. ASEAN Framework Agreement on Intellectual Property Cooperation, Bangkok, 15 December 1995.
45. Protocol Amending the Agreement on ASEAN Energy Cooperation, Bangkok, 15 December 1995.
46. Basic Agreement on ASEAN Industrial Cooperation, Singapore, 26 April 1996.
47. 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.

APPENDIX 2
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 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 20 days after the date of the establishment of a panel, at the request of either party, the Secretary-General, in consultation with the SEOM Chairman, shall determine the composition of the panel by appointing the panelists whom the Secretary-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The SEOM Chairman shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.
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. 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.
7. 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.
8. The parties to the dispute shall make available to the panel a written version of their oral statements.
9. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 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.
10. Any additional procedures specific to the panel.

Annex 9
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 I; 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 Manila, Philippines this 8th day of October 1998, in a single copy in the English language.

Annex 10
HANOI PLAN OF ACTION

Introduction

The Second ASEAN Informal Summit, held in Kuala Lumpur on 15 December 1997, adopted the ASEAN Vision 2020 which sets out a broad vision for ASEAN in the year 2020: an ASEAN as a concert of Southeast Asian Nations, outward looking, living in peace, stability and prosperity, bonded together in partnership in dynamic development and in a community of caring societies.

In order to implement the long-term vision, action plans are being drawn up to realise this Vision. The Hanoi Plan of Action (HPA) is the first in a series of plans of action building up to the realisation of the goals of the Vision.

The HPA has a six-year timeframe covering the period from 1999 to 2004. The progress of its implementation shall be reviewed every three years to coincide with the ASEAN Summit Meetings.

In recognition of the need to address the current economic situation in the region, ASEAN shall implement initiatives to hasten economic recovery and address the social impact of the global economic and financial crisis. These measures reaffirm ASEAN commitments to closer regional integration and are directed at consolidating and strengthening the economic fundamentals of the Member Countries.

I. STRENGTHEN MACROECONOMIC AND FINANCIAL COOPERATION

To restore confidence, regenerate economic growth and promote regional financial stability through maintaining sound macroeconomic and financial policies as well as strengthening financial system and capital markets enhanced by closer consultations, so as to avoid future disturbances.

1.1 Maintain regional macroeconomic and financial stability.

1.1.1 Strengthen the ASEAN Surveillance Process; and

1.1.2 Structure orderly capital account liberalisation.

1.2 Strengthen financial systems.

1.2.1 Adopt and implement sound international financial practices and standards, where appropriate by 2003;

1.2.2 Coordinate supervision and efforts to strengthen financial systems;

1.2.3 Develop deep and liquid financial markets to enable governments and private firms to raise long-term financing in local currency, thereby reducing the over dependence on bank finance and limiting the risks of financial crisis;

1.2.4 Adopt and implement existing standards of disclosure and dissemination of economic and financial information; and

1.2.5 Adopt prudential measures to mitigate the effects of sudden shifts in short-term capital flows.

1.3 Promote liberalisation of the financial services sector.

1.3.1 Intensify deregulation of the financial services sector; and

1.3.2 Intensify negotiations of financial sector liberalisation under the ASEAN Framework Agreement on Services (AFAS).

1.4 Intensify cooperation in money, tax and insurance matters.

1.4.1 Study the feasibility of establishing an ASEAN currency and exchange rate system;

1.4.2 Establish an ASEAN Tax Training Institute by 2003;

1.4.3 Enhance the role of "ASEAN Re Corporation Limited" as a vehicle to further promote regional cooperation in reinsurance business; and

1.4.4 Establish an ASEAN Insurance Training and Research Institute by 2003.

1.5 Develop ASEAN Capital Markets.

1.5.1 Adopt and implement internationally accepted practices and standards by the year 2003, and where appropriate at a later date especially for the new Member Countries;

1.5.2 Establish a set of minimum standards for listing rules, procedures and requirements by 2003;

1.5.3 Coordinate supervision of and programmes to strengthen capital markets;

1.5.4 Improve corporate governance, transparency and disclosure;

1.5.5 Develop a mechanism for cross-listing of SMEs among ASEAN capital markets by 2003, and where appropriate at a later date for the new Member Countries;

1.5.6 Facilitate cross-border capital flows and investments;

1.5.7 Facilitate clearing and settlement systems within ASEAN;

1.5.8 Promote securitisation in ASEAN;

1.5.9 Foster collaborative and cooperative networks among capital market research and training centres in Member States;

1.5.10 Prepare the framework to develop bond markets in ASEAN by 2000; and

1.5.11 Promote networking among development banks in Member States for financing of productive projects.

II. ENHANCE GREATER ECONOMIC INTEGRATION

To create a stable, prosperous and highly competitive ASEAN Economic Region in which there is a free flow of goods, services and investments, a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities.

2.1 Accelerate the implementation of the ASEAN Free Trade Area (AFTA).

2.1.1 Trade liberalisation

a. Maximise the number of tariff lines whose CEPT tariff rates shall be reduced to 0-5% by the year 2000 (2003 for Vietnam and 2005 for Laos and Myanmar);
b. Maximise the number of tariff lines whose CEPT tariff rates shall be reduced to 0% by the year 2003 (2006 for Vietnam and 2008 for Laos and Myanmar); and
c. Expand the coverage of the CEPT Inclusion List by shortening the Temporary Exclusion List, Sensitive List and General Exception List.

2.1.2 Customs harmonisation

c. Enhance trade facilitation in customs by simplifying customs procedures, expanding the Green Lane to cover all ASEAN products and implementing an ASEAN Harmonised Tariff Nomenclature by the year 2000;
d. Promote transparency, consistency and uniformity in the classification of goods traded within ASEAN and enhance trade facilitation through the provision of facilities for obtaining pre-entry classification rulings/decisions at national and regional levels by the year 2003;
e. Promote the use of transparent, consistent and uniform valuation methods and rulings through the implementation of the WTO Valuation Agreement by the year 2000;
f. Operationalise and strengthen regional guidelines on mutual assistance by the year 2003 to ensure the proper application of customs laws, within the competence of the customs administrations and subject to their national laws;
g. Fully operationalise the ASEAN Customs Training Network by the year 2000; and
h. Undertake customs reform and modernisation, in particular to implement risk management and post-importation audit by the year 2003.

2.1.3 Standards and conformity assessment

c. Harmonise product standards through alignment with international standards for products in priority sectors by the year 2000 and for regulated products by the year 2005;
d. Implement the ASEAN Framework Agreement on Mutual Recognition Arrangements (MRAs) by developing sectoral MRAs in priority areas beginning in 1999; and
e. Enhance the technical infrastructure and competency in laboratory testing, calibration, certification and accreditation by the year 2005, based on internationally-accepted procedures and guides; and
f. Strengthen information networking on standards and technical regulation through the use of, among others, the Internet, with the aim of meeting the requirements of the WTO Agreement on Technical Barriers to Trade and WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

2.1.4 Other trade facilitation activities

f. Establish a mechanism of information exchange and disclosure requirements to promote transparency of government procurement regimes by the year 2003 to facilitate participation of ASEAN nationals and companies;
g. Establish contact points in 1999 to facilitate ongoing exchange of the above information;
h. Encourage the liberalisation of government procurement;
i. Establish a mechanism of information exchange by 2003 to promote transparency of each domestic regulatory regime by publishing annual reports detailing actions taken by ASEAN Member States to deregulate their domestic regimes; and
j. Encourage the increased use of regional currencies for intra-ASEAN trade transactions.

2.2 Implement the Framework Agreement on ASEAN Investment Area (AIA).

The ASEAN Investment Area aims to enhance the competitiveness of the region for attracting higher and sustainable levels of direct investment flows into and within ASEAN. Three broad-based programmes of action shall form the thrust of the AIA arrangement. These are Cooperation and

Facilitation, Promotion and Awareness, and Liberalisation Programme. These programmes shall be implemented through individual and collective action plans, within the agreed schedules and timetable. The ASEAN Investment Area is to be realised through implementing, among others, the following key measures:

f. Immediately extend national treatment and open up all industries for investments. However, for some exceptions, as specified in the Temporary Exclusion List and the Sensitive List, these will be progressively liberalised to all ASEAN investors by 2010 or earlier and to all investors by 2020 in accordance with the provisions of the Framework Agreement on AIA;
g. Identify and progressively eliminate restrictive investment measures;
h. Liberalise rules, regulations and policies relating to investment; rules on licensing conditions; rules relating to access to domestic finance; and rules to facilitate payment, receipts and repatriation of profits by investors;
i. Complete implementation of all the measures and activities identified in the Schedule 1 of "Cooperation and Facilitation Programme" under the AIA Agreement by 2010 or earlier;
j. Complete implementation of all the measures and activities identified in the Schedule II of "Promotion and Awareness Programme" under the AIA Agreement by 2010 or earlier;
k. Improve and enhance the measures and activities of the Cooperation and Facilitation, and Promotion and Awareness Programmes to further strengthen the implementation process of the AIA arrangement;
l. Undertake active and high profile joint investment promotion activities to promote greater awareness of investment opportunities in ASEAN to global and regional investors. This shall include, among others, joint publications of investment and business information as well as databases and statistics;
m. Promote freer flow of capital, skilled labour, professionals and technology among ASEAN Member States;
n. Work towards establishing a comparable approach of FDI data collection, measurement and reporting among the Member States;
o. Undertake activities to increase transparency of investment regimes of Member States; and
p. Identify areas for technical cooperation in human resource development, R&D, infrastructure development, SME and supporting industry development, information and industrial technology development.

2.3 Liberalise Trade in Services.

The ASEAN Framework Agreement on Services will strengthen service suppliers and introduce more competition into this large and important sector of ASEAN Member's States and open new doors for service suppliers in the region.

2.3.1 Liberalisation

a. Progressively liberalise trade in services by initiating a new round of negotiations beginning 1999 and ending 2001;
b. Expand the scope of negotiations in services beyond the seven priority sectors, identified at the Fifth ASEAN Summit, to cover all services sectors and all modes of supply;
c. Seek to accelerate the liberalisation of trade in services through the adoption of alternative approaches to liberalisation; and
d. Accelerate the free flow of professional and other services in the region.

2.3.2 Facilitation

a. Encourage the free exchange of information and views among professional bodies in the region with the view to achieving mutual recognition arrangements;
b. Conduct an impact study by the year 2000 on the removal of transport, travel and telecommunication barriers in ASEAN; and
c. Develop standard classification and categorisation of tourism products and services to facilitate the region's implementation of the General Agreement on Trade in Services (GATS) and the ASEAN Framework Agreement on Services (AFAS).

2.3.3 Cooperation

a. Strengthen and enhance existing cooperation efforts in service sectors through such means as establishing or improving infrastructure facilities, joint production, marketing and purchasing arrangements, research and development and exchange of information;
b. Develop cooperation activities in new sectors that are not covered by existing cooperation arrangements; and
c. Cooperate to harmonise entry regulations with regard to commercial presence.

2.4 Enhance food security and global competitiveness of ASEAN's food, agriculture and forestry products.

ASEAN would strive to provide adequate levels of food supply and food accessibility within ASEAN during instances of food shortages to ensure food security and at the same time, enhance the competitiveness of its food, agriculture and forestry sectors through developing appropriate technologies to increase productivity and by promoting intra- and extra–ASEAN trade and greater private sector investment in the food, agriculture and forestry sector.

2.4.1 Strengthen food security arrangements in the region.

a. Enhance ASEAN food security statistical database and information by establishing an ASEAN Food Security Information System (AFSIS) which would allow Member States to effectively forecast, plan and manage food supplies and utilisation of basic commodities;
b. Develop a Common Framework to analyse and review the regional food trade policies in the light of the AFTA, and to enhance intra-ASEAN food trade by undertaking a study on the long-term supply and demand prospects of major food commodities (rice, corn, soybean, sugar, pulses and oilseeds) in ASEAN;
c. Strengthen the food marketing system of agricultural cooperatives for enhancing food security in ASEAN; and
d. Review the Agreement on the ASEAN Emergency Rice Reserve (AERR) to realise effective cross-supply arrangements of food during times of emergency.

2.4.2 Develop and Adopt Existing and New Technologies.

a. Conduct collaborative research to develop new/improved technologies in food, agriculture and forestry production, post-harvest and processing activities and sharing of research results and available technology;
b. Conduct R&D in critical areas to reduce the cost of inputs for food, agriculture and forestry production; and
c. Strengthen programmes in food, agriculture and agro-forestry technology transfer, training and extension to increase productivity.

2.4.3 Enhance the Marketability of ASEAN Food, Agriculture and Forestry Products/Commodities.

a. Develop, harmonise and adopt quality standards and regulations for food, agriculture and forestry products;
b. Promote diversification of forest products; and
c. Promote and implement training programmes and share and exchange expertise in the field of food, agriculture and forestry.

2.4.4 Enhance Private Sector Involvement.

a. Conduct a study to identify high-impact investment opportunities in key areas under the food, agriculture and forestry sectors in ASEAN and to provide essential information for investment decisions on these opportunities; and
b. Establish networking and strategic alliances with the private sector to promote investment and joint venture opportunities in ASEAN.

2.4.5 Enhance ASEAN Cooperation and Joint Approaches in International and Regional Issues.

e. Strengthen ASEAN's cooperation and joint approaches in addressing issues and problems affecting trade in the region's food, agriculture and forestry products including environment and labour issues; and
f. Seek closer cooperation and negotiate, through relevant ASEAN bodies, with trading partners on market access for ASEAN products

2.4.6 Promote Capacity Building and Human Resources Development.

a. Promote and implement training programmes in the field of food, agriculture and forestry, including the exchange of experts; and
b. Develop and strengthen agricultural rural communities through enhanced human resource development.

2.5 Intensify industrial cooperation.

a. Expedite the implementation of AICO.
b. Establish a Directory of Major ASEAN Manufacturing Companies;
c. Explore the merits of common competition policy;
d. Increase value-added contribution of ASEAN Manufacturing Sector;
e. Explore/develop other areas of cooperation that has not been covered under the existing arrangement; and

f. Establish R&D/ Skill Development Centres.

2.6 Foster small and medium enterprises (SMEs).

Recognising that small and medium scale enterprises constitute the majority of industrial enterprises in ASEAN and that they play a significant role in the overall economic development of Member States, ASEAN needs to cooperate in order to develop a modern, dynamic, competitive and efficient SME sector. The SME cooperation will address priority areas of human resource development, information dissemination, access to technology and technology sharing, finance and market. The SME cooperation will also ensure the development and implementation of non-discriminatory market-oriented policies in ASEAN that will provide a more favourable environment for SME development.

2.6.1 Facilitation

a. Encourage Member States to establish national export financing/credit guarantee schemes for SMEs;
b. Explore the possibility of establishing regional export financing/credit guarantee scheme;
c. Explore the possibility of establishing an ASEAN Investment Fund for SME; and
d. Explore the possibility of establishing a trade or industrial cooperation scheme to promote intra-ASEAN cooperation for SMEs.

2.6.2 Cooperation

a. Compile Member States' SME policies and best practices in selected sectors to enhance mutual understanding and possible adoption;
b. Compile and provide information to SMEs on policies and opportunities including electronic media such as the Internet websites;
c. Promote information networking between existing SME-related organisations in ASEAN;
d. Promote awareness among SMEs on benefits and availability of other sources of finance such as venture-capital and equity;
e. Enhance interactions between Government Sector Institutions (GSI) and Private Sector Institutions (PSI) on SME development by convening biennial GSI/PSI conference;
f. Undertake selected sectoral regional study on the potential areas of finance, market, production technology and management for possible trade and industrial cooperation between/among SMEs in the region;
g. Organise annual ASEAN match-making workshops to promote SME joint-ventures and linkages between SMEs and LSEs;
h. Organise annual joint ASEAN trade promotion activities/trade exposition;
i. Encourage national venture-capital company to go regional;
j. Organise annual meetings of all national Credit Guarantee Corporations (CGC) in ASEAN;
k. Harness the capacity of non-ASEAN SMEs as a source of technology to ASEAN SMEs;
l. Organise biennial ASEAN technology exposition;
m. Organise regular joint training programmes, seminars and workshops for SMEs;
n. Compile and publish a directory of resource persons in ASEAN in the area of production technology and management;
o. Develop programmes on entrepreneurship development and innovation in all Member States; and
p. Assist new members of ASEAN on SME development through specialised training programmes and technical assistance.

2.7 Further intellectual property cooperation.

To ensure adequate and effective protection, including legislation, administration and enforcement, of intellectual property rights in the region based on the principles of Most Favoured Nation (MFN) treatment, national treatment and transparency as set out in the TRIPS Agreement.

2.7.1 Protection

a. Strengthen civil and administrative procedures and remedies against infringement of intellectual property rights and relevant legislation; and
b. Provide and expand technical cooperation in relation to areas such as patent search and examination, computerisation and human resource development for the implementation of the TRIPS Agreement;

2.7.2 Facilitation

a. Deepen Intellectual Property policy exchange among ASEAN Member States;

b. Survey the current status of intellectual property rights protection in each ASEAN Member State with a view to studying measures, including development principles, for the effective enforcement of intellectual property rights;
c. Develop a contact point list of public and business/private sector experts on intellectual property rights and a list of law enforcement officers, the latter list for the purpose of establishing a network to prevent cross-border flow of counterfeits;
d. Exchange information on well-known marks as a first step in examining the possibility of establishing a region-wide trademark system;
e. Exchange information on current intellectual property rights administrative systems with a view to simplifying and standardising administrative systems throughout the region;
f. Ensure that intellectual property legislation conform to the TRIPS Agreement of the World Trade Organisation through the review of intellectual property laws and introduction of TRIPS-consistent laws. This would begin with a comprehensive review of existing legislation to be completed by the year 2000; and
g. Strengthen intellectual property administration by setting up an ASEAN electronic database by the year 2004 on patents, designs, geographical indications, trademarks and information on copyright and layout design of integrated circuits.

2.7.3 Cooperation

a. Implement an ASEAN Regional Trademark and Patent Filing System by the year 2000;
b. Establish an ASEAN Regional Fund for Trademark and Patent by the year 2000;
c. Finalise and implement an ASEAN Common Form for Trade Mark and Patent Applications;
d. Establish a regional trademark and patent registration system; or establish a regional trademark or patent office (on voluntary basis);
e. Promote accession of Member States to international treaties;
f. Promote Intellectual Property public and private sector awareness;
g. Introduce Intellectual Property as a subject in the curriculum of higher learning institutions;
h. Develop training programmes for Intellectual Property officials; and
i. Enhance intellectual property enforcement and protection through establishing mechanisms for the dissemination of information on ASEAN intellectual property administration, registration and infringement; facilitating interaction among legal and judicial bodies through seminars, etc.; facilitating networking among intellectual enforcement agencies; encouraging bilateral/plurilateral arrangements on mutual protection and joint cooperation in enforcement of Intellectual Property Rights.

2.8 Encourage electronic commerce.

2.8.1 Create policy and legislative environment to facilitate cross-border Electronic Commerce;
2.8.2 Ensure the coordination and adoption of framework and standards for cross-border Electronic Commerce, which is in line with international standards and practices; and
2.8.3 Encourage technical cooperation and technology transfer among Member States in the development of Electronic Commerce infrastructure, applications and services.

2.9 Promote ASEAN tourism.

2.9.1 Launch the Visit ASEAN Millennium Year as the catalytic focus for the first plan of action;
2.9.2 Conduct Strategic Studies for Joint Marketing of the ASEAN Region in the 21st Century, and the convening of Top-level Tourism Marketing Missions to promote the region;
2.9.3 Develop a Website/Information Database on relevant tourism statistical data and other related information within the ASEAN Secretariat by the beginning of the year 2000;
2.9.4 Establish a Network among ASEAN Tourism Training Centres with emphasis on new job skills and new technologies by 2001 in tourism policy and planning;
2.9.5 Develop trainer and training material database for ASEAN to be completed by 2001;
2.9.6 Conduct Eco-Tourism Promotion Programmes for Travel Trade and Consumers;
2.9.7 Complete cruise tourism development study in ASEAN by the year 2000.
2.9.8 Encourage the establishment of the ASEAN Lane for facilitating intra-ASEAN travel;
2.9.9 Increase the use of the Internet or other electronic global distribution systems in the ASEAN travel industry; and
2.9.10 Launch the ASEAN Tourism Investment Guide in 1999.

2.10 Develop regional infrastructure.

To intensify cooperation in the development of highly efficient and quality infrastructure, and in the promotion and progressive liberalisation of these services sectors:

2.10.1 Transport

a. Develop the Trans-ASEAN transportation network by the year 2000 as the trunkline or main corridor for the movement of goods and people in ASEAN, consisting of major road (interstate highway) and railway networks, principal ports and sea lanes for maritime traffic, inland waterway transport and major civil aviation links;
b. Operationalise the ASEAN Framework Agreement on the Facilitation of Goods in Transit by year 2000. For this purpose, its implementing Protocols will be finalised and concluded by December 1999;
c. Target the conclusion and operationalisation of the ASEAN Framework Agreement on the Facilitation of Inter-State Transport by the year 2000;
d. Implement the ASEAN Framework Agreement on Multimodal Transport;
e. Develop a Maritime/Shipping Policy for ASEAN to cover, among others, transhipment, enhancing the competitiveness of ASEAN ports, further liberalisation of maritime transport services, and the integration of maritime transport in the intermodal and logistics chain;
f. Adopt harmonised standards and regulations with regard to vehicle specifications (e.g. width, length, height and weight), axle load limits, maximum weights and pollution or emission standards;
g. Institute the policy framework and modalities by the year 2000 for the development of a Competitive Air Services Policy which may be a gradual step towards an Open Sky Policy in ASEAN; and
h. Develop and implement the Singapore-Kunming Rail Link and the ASEAN Highway Network Projects.

2.10.2 Telecommunications

a. Achieve the interoperability and interconnectivity of the National Information Infrastructures (NIIs) of Member States by the year 2010;
b. Develop and implement an ASEAN Plan of Action on Regional Broadband Interconnectivity by the year 2000; and
c. Intensify cooperation in ensuring seamless roaming of telecommunications services (i.e., wireless communications) within the region, as well as in facilitating intra-ASEAN trade in telecommunications equipment and services.

2.10.3 Energy

a. Ensure security and sustainability of energy supply, efficient utilisation of natural energy resource in the region and the rational management of energy demand, with due consideration of the environment; and
b. Institute the policy framework and implementation modalities by 2004 for the early realization of the trans-ASEAN energy networks covering the ASEAN Power Grid and the Trans-ASEAN Gas Pipeline Projects as a more focused continuation of the Medium-Term Programme of Action (1995-1999).

2.10.4 Water utility

a. Cooperate on a regular basis, exchange of information, knowledge, and experiences among Member States as means to improve water resources management and water supply system within the region; and
b. Support the development of Trans-ASEAN land and submarine pipeline for conveyance of raw water between ASEAN Member States.

2.11 Further development of growth areas.

To narrow the gap in the level of development among Member States and to reduce poverty and socio-economic disparities in the region.

2.11.1 Actively expedite the implementation and further development of growth areas such as the Brunei-Indonesia-Malaysia-Philippines East ASEAN Growth Area (BIMP-EAGA), Indonesia-Malaysia-Singapore Growth Triangle (IMS-GT), Indonesia-Malaysia-Thailand Growth Triangle (IMT-GT), and the inter-state areas along the West-East Corridor (WEC) of Mekong Basin in Vietnam, Laos, Cambodia and North-eastern Thailand within the ASEAN-Mekong Basin Development Cooperation Scheme.

2.11.2 Facilitate the economic integration of the new Members into ASEAN.

III. PROMOTE SCIENCE & TECHNOLOGY DEVELOPMENT AND DEVELOP INFORMATION TECHNOLOGY INFRASTRUCTURE

3.1 Establish the ASEAN Information Infrastructure (AII).

3.1.1 Forge agreements among Member Countries on the design, standardization, inter-connection and inter-operability of Information Technology systems by 2001.

3.1.2 Ensure the protection of intellectual property rights and consumer rights.

3.2 Develop the information content of the AII by 2004.

3.3 Establish networks of science & techonology centres of excellence and academic institutions by 2001.

3.4 Intensify research & development (R&D) in applications of strategic and enabling technologies.

3.5 Establish a technology scan mechanism and institutionalise a system of science & technology indicators by 2001.

3.6 Develop innovative systems for programme management and revenue generation to support ASEAN science and technology.

3.7 Promote greater public and private sector collaboration in science and technology, particularly in information technology.

3.8 Undertake studies on the evolution of new working conditions and living environments resulting from widespread use of information technology by 2001.

IV. PROMOTE SOCIAL DEVELOPMENT AND ADDRESS THE SOCIAL IMPACT OF THE FINANCIAL AND ECONOMIC CRISIS

4.1 Strive to mitigate the social impact of the regional financial and economic crisis.

4.2 Implement the Plan of Action on ASEAN Rural Development and Poverty Eradication and, in view of the financial and economic crisis, implement the ASEAN Plan of Action on Social Safety Nets to ensure that measures are taken to protect the most vulnerable sectors of our societies.

4.3 Use the ASEAN Foundation to support activities and social development programmes aimed at addressing issues of unequal economic development, poverty and socio-economic disparities.

4.4 Implement the ASEAN Plan of Action for Children which provides for the framework for ensuring the survival, protection and development of children.

4.5 Strengthen ASEAN collaboration in combating the trafficking in, and crimes of violence against, women and children.

4.6 Enhance the capacity of the family and community to care for the elderly and the disabled.

4.7 Strengthen the ASEAN Regional Aids Information and Reference Network.

4.8 Enhance exchange of information in the field of human rights among ASEAN Countries in order to promote and protect all human rights and fundamental freedoms of all peoples in accordance with the Charter of the United Nations, the Universal Declaration of Human Rights and the Vienna Declaration and Programme of Action.

4.9 Work towards the full implementation of the Convention on the Rights of the Child and the Convention on the Elimination of all Forms of Discrimination against Women and other international instruments concerning women and children.

4.10 Strengthen regional capacity to address transnational crime.

4.11 Implement the ASEAN Work Programme to Operationalise the ASEAN Plan of Action on Drug Abuse Control by 2004, and continue developing and implementing high-profile flagship programmes on drug abuse control, particularly those related to prevention education for youth, and treatment and rehabilitation.

V. PROMOTE HUMAN RESOURCE DEVELOPMENT

5.1 Strengthen the ASEAN University Network and move forward the process of transforming it into the ASEAN University.

5.2 Strengthen the education systems in Member Countries by 2001 so that all groups of people, including the disadvantaged, can have equal access to basic, general and higher education.

5.3 Implement the ASEAN Work Programme on Informal Sector Development to provide opportunities for self-employment and entrepreneurship.

5.4 Implement the ASEAN Work Programme on Skills Training for Out-of-School Youth by 2004, to strengthen their capacity to obtain gainful employment.

5.5 Strengthen regional networking of HRD centres of excellence and develop the regional capacity for HRD planning and labour market monitoring.

5.6 Establish and strengthen networks in education and training, particularly those promoting occupational safety and health, skills training for out-of-school youth, distance education by 2004.

5.7 Intensify efforts of the ASEAN Network for Women in Skills Training to enhance the capacity of disadvantaged women to enter the work force.

5.8 Begin to implement the ASEAN Science and Technology Human Resource Programme addressing the needs of industry and business by 2000.

5.9 Implement regional training programmes for ASEAN Civil Service Officers and strengthen networks among ASEAN Civil Service Commissions.

5.10 Establish networks of professional accreditation bodies to promote regional mobility and mutual recognition of technical and professional credentials and skills standards, beginning in 1999.

VI. PROTECT THE ENVIRONMENT AND PROMOTE SUSTAINABLE DEVELOPMENT

6.1 Fully implement the ASEAN Cooperation Plan on Transboundary Pollution with particular emphasis on the Regional Haze Action Plan by the year 2001.

6.2 Strengthen the ASEAN Specialized Meteorological Centre with emphasis on the ability to monitor forest and land fires and provide early warning on transboundary haze by the year 2001.

6.3 Establish the ASEAN Regional Research and Training Centre for Land and Forest Fire Management by the year 2004.

6.4 Strengthen the ASEAN Regional Centre for Biodiversity Conservation by establishing networks of relevant institutions and implement collaborative training and research activities by the year 2001.

6.5 Promote regional coordination for the protection of the ASEAN Heritage Parks and Reserves.

6.6 Develop a framework and improve regional coordination for the integrated protection and management of coastal zones by the year 2001.

6.7 Strengthen institutional and legal capacities to implement Agenda 21 and other international environmental agreements by the year 2001.

6.8 Harmonise the environmental databases of Member Countries by the year 2001.

6.9 Implement an ASEAN regional water conservation programme by the year 2001.

6.10 Establish a regional centre or network for the promotion of environmentally sound technologies by the year 2004.

6.11 Formulate and adopt an ASEAN Protocol on access to genetic resources by the year 2004.

6.12 Develop a Regional Action Plan for the Protection of the Marine Environment from Land-based and Sea-based Activities by the year 2004.

6.13 Implement the Framework to Achieve Long-Term Environmental Goals for Ambient Air and River Water Qualities for ASEAN Countries.

6.14 Enhance regional efforts in addressing climatic change.

6.15 Enhance public information and education in awareness of and participation in environmental and sustainable development issues.

VII. STRENGTHEN REGIONAL PEACE AND SECURITY

7.1 Consolidate and strengthen ASEAN's solidarity, cohesiveness and harmony by strengthening national and regional resilience through enhanced cooperation and mutual assistance to further promote Southeast Asia as a Zone of Peace, Freedom and Neutrality.

7.2. Promote coherent and comprehensive programmes of bilateral and regional cooperation and technical assistance to ASEAN member states to strengthen their integration into the community of Southeast Asian nations.

7.3 Ratify the Second Protocol of the Treaty of Amity and Cooperation in Southeast Asia (TAC) as soon as possible.

7.4 Encourage and facilitate the accession by ASEAN's Dialogue Partners and other interested countries to the Treaty of Amity and Cooperation with a view to developing the TAC into a code of conduct governing relations between Southeast Asian States and those outside the region.

7.5 Formulate draft rules of procedure for the operations of the High Council as envisioned in TAC.

7.6 Encourage greater efforts towards the resolution of outstanding problems of boundaries delimitation between ASEAN member states.

7.7 Ensure border security and facilitate safe and convenient border crossings.

7.8 Encourage Member Countries to cooperate in resolving border-related problems and other matters with security implications between ASEAN member countries.

7.9 Promote efforts to secure acceptance by Nuclear Weapon States of the Treaty on Southeast Asia Nuclear Weapon-Free Zone (SEANWFZ), including their early accession to the Protocol to the SEANWFZ Treaty.

7.10 Convene the Commission for SEANWFZ Treaty to oversee the implementation of the Treaty and ensure compliance with its provisions.

7.11 Support and participate actively in all efforts to achieve the objectives of general and complete disarmament, especially the non-proliferation of nuclear weapons and other weapons of mass destruction.

7.12 Encourage ASEAN Member Countries parties to a dispute to engage in friendly negotiation and use the bilateral and regional processes of peaceful settlement of dispute or other procedures provided for in the U.N. Charter.

7.13 Enhance efforts to settle disputes in the South China Sea through peaceful means among the parties concerned in accordance with universally recognized international law, including the 1982 U.N. Convention on the Law of the Sea.

7.14 Continue efforts to promote confidence-building measures in the South China Sea between and among parties concerned.
7.15 Encourage all other parties concerned to subscribe to the ASEAN Declaration on the South China Sea.
7.16 Promote efforts to establish a regional code of conduct in the South China Sea among the parties directly concerned.
7.17 Intensify intra-ASEAN security cooperation through existing mechanisms among foreign affairs and defense officials.

VIII. ENHANCE ASEAN'S ROLE AS AN EFFECTIVE FORCE FOR PEACE, JUSTICE, AND MODERATION IN THE ASIA-PACIFIC AND IN THE WORLD

8.1 Maintain ASEAN's chairmanship in the ASEAN Regional Forum (ARF) process.
8.2 Undertake, actively and energetically, measures to strengthen ASEAN's role as the primary driving force in the ARF, including directing the ASEAN Secretary-General to provide the necessary support and services to the ASC Chairman in coordinating ARF activities.
8.3 Formulate initiatives to advance, on a consensus basis and at a pace comfortable to all, the ARF process from its current emphasis on confidence-building to promoting preventive diplomacy.
8.4 Promote public awareness of the ARF process and the need for ASEAN's role as the primary driving force in respective ASEAN Member Countries.
8.5 Continue the involvement of ASEAN defense and security officials together with foreign affairs officials in ARF activities.
8.6 Develop a set of basic principles based on TAC as an instrument for promoting cooperative peace in the Asia-Pacific region.
8.7 Enhance consultation and coordination of ASEAN positions at the United Nations and other international fora.
8.8 Revitalize ASEAN's relations with Dialogue Partners on the basis of equality, non-discrimination and mutual benefit.

IX. PROMOTE ASEAN AWARENESS AND ITS STANDING IN THE INTERNATIONAL COMMUNITY

9.1 Support the activities of the ASEAN Foundation and other available resources and mechanisms to promote ASEAN awareness among its people.
9.2 Launch, within ASEAN's existing resources, a concerted communications programme to promote ASEAN's standing in the international community and strengthen confidence in ASEAN as an ideal place for investment, trade and tourism.
9.3 Establish and operate an ASEAN satellite channel by year 2000.
9.4 Provide and disseminate materials on ASEAN's efforts to cope with the financial and economic crisis.
9.5 Publicise ASEAN's HPA priorities through ASEAN's external mechanisms with its Dialogue Partners.
9.6 Develop linkages with mass media networks and websites on key areas of ASEAN cooperation to disseminate regular and timely information on ASEAN.
9.7 Prepare and adopt an ASEAN Declaration on Cultural Heritage by year 2000.
9.8 Mount professional productions of ASEAN performances and exhibitions within and outside ASEAN and provide adequate mass media coverage on such activities.
9.9 Organize art and cultural immersion camps and exchange programmes for the youth and encourage their travel to other ASEAN Member Countries.
9.10 Establish an ASEAN Multi-Media Centre by the year 2001 to conduct professional training programmes and provide production facilities and services for mass media and communication practitioners.

X. IMPROVE ASEAN'S STRUCTURES AND MECHANISMS

10.1 Review ASEAN's overall organisational structure in order to further improve its efficiency and effectiveness, taking into account the expansion of ASEAN activities, the enlargement of ASEAN membership, and the regional situation.
10.2 Review and streamline ASEAN external relations mechanisms with its Dialogue Partners, regional organisations and other economic groupings.
10.3 Review the role, functions and capacity of the ASEAN Secretariat to meet the increasing demands of ASEAN and to support the implementation of the Hanoi Plan of Action.

Annex 11

STATEMENT ON BOLD MEASURES
6th ASEAN Summit, Hanoi, 16 December 1998

1. The financial and economic crisis has severely affected the ASEAN economies and business dynamism in the region. In order to regain business confidence, enhance economic recovery and promote growth, the ASEAN Leaders are committed to the realisation of the ASEAN Free Trade Area (AFTA). In addition, the Leaders agreed on special incentives and privileges to attract foreign direct investment into the region. To enhance further economic integration of the region, the Leaders also agreed to further liberalise trade in services.

Acceleration of AFTA

2. To accelerate the ASEAN Free Trade Area (AFTA), the Leaders agreed that the six original signatories to the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA) - Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand - would advance the implementation of AFTA by one year from 2003 to 2002. They also agreed to achieve a minimum of 90% of their total tariff lines with tariffs of 0-5% by the year 2000, which would account for 90% of intra-ASEAN trade.

3. Individually, each country would commit to achieve a minimum of 85% of the Inclusion List with tariffs of 0-5% by the year 2000. Thereafter, this would be increased to a minimum of 90% of the Inclusion list in the 0-5% tariff range by the year 2001. By 2002, 100% of items in the Inclusion List would have tariffs of 0-5% with some flexibility.

4. Member Countries also agreed to deepen, as soon as possible, tariff reduction to 0% and accelerate the transfer of products, which are currently not included in the tariff reduction scheme, into the Inclusion List.

5. The new members of ASEAN shall maximise their tariff lines between 0-5% by 2003 for Vietnam and 2005 for Laos and Myanmar; and expand the number of tariff lines in the 0% category by 2006 for Vietnam and by 2008 for Laos and Myanmar.

Short-Term Measures to Enhance ASEAN Investment Climate

6. In the area of investments, each ASEAN country has agreed to extend additional special privileges to qualified ASEAN and non-ASEAN investors in the manufacturing sector, for applications received from 1 January 1999 to 31 December 2000 and approved thereafter. These incentives cover the following seven areas:

iv. minimum three year corporate income tax exemption or a minimum 30% corporate investment tax allowance;
v. 100% foreign equity ownership;
vi. duty-free imports of capital goods;
vii. domestic market access;
viii. minimum industrial land leasehold period of 30 years;
ix. employment of foreign personnel; and
x. speedy customs clearance.

Details of these measures are available in the attached ANNEX.

7. Highlights of the new measures offered by individual ASEAN countries include the following:

- Brunei Darussalam will allow 100% foreign equity in high-technology manufacturing and export-oriented industries.
- Indonesia offers wholesale and retail trade up to 100% foreign equity ownership to qualified investors, in addition to 100% foreign equity in all areas of the manufacturing sector. Indonesia has also reduced the processing time for approval in principle, for investments less than US$100 million, to 10 working days. In the banking sector, listed banks are open for 100% foreign equity ownership.
- Lao PDR offers duty exemption on imported capital goods required by the promoted investment projects.
- Malaysia allows 100 percent foreign equity ownership in all areas of manufacturing except for seven specific activities/products. No export conditions are imposed for all new investments, expansions and diversifications.
- Myanmar will extend minimum of 3 years corporate tax exemption to all investment projects in all sectors. In addition, Myanmar will also extend duty free import of raw materials to all industrial investments for the first three years of operation.

- Philippines is in the process of opening up retail trade and distribution business to foreign equity. In addition, the Philippines has opened private construction in the domestic market to foreign companies.
- Singapore has substantially reduced business costs as part of a cost reduction package that amounts to S$ 10 billion in savings in addition to extending 30% corporate investment tax allowance on a liberal basis to industrial projects and to selected service industries in respect of productive equipment.
- Thailand will allow 100% foreign equity ownership for manufacturing investment projects regardless of locations.
- Vietnam extends duty exemption on imported capital goods for all projects and on raw materials for projects located in mountainous or remote regions and for specially encouraged investments for the first 5 years of operation. Issuance of investment licenses for several types of projects has been reduced to 15 days from the receipt of proper simplified documents.

8. Under the Framework Agreement on the ASEAN Investment Area signed on 7 October 1998 in Manila, national treatment will be made fully available within six months after the date of signing of the Agreement for ASEAN investors in the manufacturing sector, subject to certain exclusions. These exclusions will be progressively phased out by the year 2003 instead of waiting for 2010 as initially agreed. Myanmar will join the six ASEAN countries to progressively phase out the exclusions by 2003 instead of 2015. Vietnam and Laos would exert their best efforts to achieve early realisation of AIA and shall do so no later than 2010, instead of 2013 and 2015, respectively.

ASEAN Industrial Cooperation (AICO) Scheme

9. To provide greater scope for industrial cooperation in the region, Member Countries agreed to waive the 30% national equity requirement under the AICO Scheme during the period 1999-2000.

Launching the Second Round of Negotiations on Services

10. In the area of trade in services, the Leaders have agreed to initiate a new round of negotiations beginning 1999 and ending 2001. The negotiations will be expanded beyond the seven priority sectors, identified at the Fifth ASEAN Summit, to cover all services sectors and all modes of supply.

Annex 12

SHORT-TERM MEASURES TO ENHANCE ASEAN INVESTMENT CLIMATE

The following measures will be taken to stimulate investment in ASEAN. In particular, companies that submit relevant applications to the ASEAN Investment Agencies from 1 January 1999 to 31 December 2000 and approved thereafter, with regard to investment projects in the manufacturing sector, will be granted the following:

Section 1
Privileges Granted to New Investments/Projects or Expansion of Existing Investment Operations

1. Fiscal Incentives

Companies will be given :

i. a minimum of 3 years corporate income tax exemption or a minimum 30% corporate income tax allowance. This tax exemption is not granted on an incremental basis over and above existing incentive provisions.
ii. duty exemption on imported capital goods required by the promoted investment projects.

2. Domestic Market Access
Companies will be given free market access to the domestic market of the host country.
3. Foreign Equity Ownership
Companies will be allowed 100% foreign equity ownership.
4. Right of Use of Industrial Land
Companies will be given the right of use or lease of factory or industrial land for a minimum period of 30 years.
5. Customs Clearance
Approved investment projects will be given speedy customs clearance through the ASEAN CEPT Green Lane or equivalent procedures adopted by the ASEAN Member Countries for all raw materials and capital goods required by the investment projects.
6. Employment of Foreign Personnel
The privileges cover more relaxed policy on the following:
   i. Approval of foreign professional, managerial and technical personnel posts required by the investor;
   ii. At least one-year renewable multiple entry visas and exit permits for all foreign professional, managerial and technical personnel and their family members, where applicable; and
   iii. Restrictions and levies on the employment of foreign professional, managerial and technical personnel, if any.

Section 2
Privileges Granted to Investors Injecting Equity Into Existing Companies

All privileges available under Section 1, except for corporate tax incentives and land use privileges, also apply to investors under Section 2. However, with regard to tax incentives, the remaining period of the tax privileges enjoyed by the company being taken over, or into which capital is injected, will continue to be available to the new equity owners.

Section 3
Highlights of Specific Measures Extended by ASEAN Member Countries

Brunei Darussalam

Brunei Darussalam will allow 100% foreign equity ownership in high-technology manufacturing and export-oriented industries.

Indonesia

Indonesia offers wholesale and retail trade up to 100% foreign equity ownership to qualified investors, in addition to 100% foreign equity in all areas of the manufacturing sector.
Indonesia has also reduced the processing time for approval in principle, for investments less

than US$100 million, to 10 working days. In the banking sector, listed banks are open for 100% foreign equity ownership.

Lao PDR

Lao PDR allows duty exemption on imported capital goods required by the promoted investment projects.

Malaysia

Malaysia offers 100% foreign equity ownership in the manufacturing sector with no export conditions imposed on all new investments, expansions and diversifications (except for seven specific activities and products).

With limited exceptions, foreigners can also own land in Malaysia.

Myanmar

Myanmar will extend minimum of three years corporate tax exemption to all investment projects in all sectors. In addition, Myanmar will also extend duty free import of raw materials to all industrial investments for the first three years of operation.

Philippines

Philippines will open retail trade and distribution business to foreign equity. In addition, the Philippines has opened private construction in the domestic market to foreign companies.

Singapore

Singapore has substantially reduced business costs as part of a cost reduction package that amounts to S$10 billion in savings in addition to extending 30% corporate investment tax allowance on a liberal basis to industrial projects and to selected service industries in respect of productive equipment. These activities include manufacturing, engineering or technical services and computer-related services.

Thailand

Thailand allows 100% foreign equity ownership for manufacturing projects regardless of location. Furthermore, agricultural projects which export 80% of sales will receive import duty exemption on machinery, regardless of location.

Vietnam

Vietnam extends duty exemption on imported capital goods for all projects. In respect of inport of raw materials for production for specially encouraged investments and for projects located in mountainous or remote regions for the first 5 years of operation. Issuance of investment licenses for several types of projects has been reduced to 15 days from the receipt of proper simplified documents. In addition, investment licensing for projects under US$ 5 million has been decentralised to all provinces and cities.

Section 4

Conditions

To qualify for the privileges stipulated in the above sections of this Memorandum, investors must satisfy the following specific conditions:

iv. Meet the minimum investment level specified by the host country, if any;
v. The industry must be in the published priority list for tax incentives to enjoy this particular privilege;
vi. The industry must not be in any negative list, if any; and
vii. The investor must show proof that foreign funds have been brought in for the entire amount of the investment, if required by the host country.

Some details on specific privileges are contained in the table below.

MEASURES	<VALIGN="TOP"COMMENTS
1. Fiscal Incentives	Details of incentives, priority list and other terms and conditions can be obtained from the individual Member Countries' websites or the individual Member Countries' contact points listed in Section 6.
2. Duty exemption on the import of capital goods	**Malaysia** - duty-free for export zones and exemption for export-oriented projects. For others, applicable, if not locally manufactured. **Philippines** - only in export-zones, free ports and selected sectors covered by special laws. **Thailand** - duty free for export-oriented and special projects located in all zones and projects located in zone 3, if not manufactured locally.
3. Free market access to domestic market	**Indonesia** - covers all industries except those in the

	negative list and those in the bonded zones. **Lao PDR** - export condition may be imposed on selected products. **Myanmar** - only a certain amount will be allowed for domestic market. **Malaysia, Philippines, Singapore, Thailand and Vietnam** - covers all industries except those listed in the negative list.
4. 100% foreign equity ownership	**Brunei Darussalam** - only for high-technology manufacturing and export-oriented projects. **Indonesia** - after 15 years, companies must have at least some local equity ownership. **Indonesia, Malaysia** **Philippines, Singapore** **Thailand** And **Vietnam** - covers all industries except those listed in the negative list.
5. Removal of Restrictions and Levies on the Employment of Foreign Nationals, if any	**Indonesia** - any individuals must pay an exit tax but this is deductible against income tax. **Malaysia** - Foreign professionals, managerial and technical personnel paying income tax are exempted from paying levy.

The priority list of industries, the negative list of the respective Member Countries and other details relating to the privileges are available in the ASEAN website as well as the individual Member Countries' investment agencies websites or through the individual Member Countries contact points listed in Section 6.

The Investment Agencies are required to complete processing of the relevant applications within 60 working days from receipt of fully completed applications.

In addition to the specific conditions, an investor must submit an application to the Investment Agency of the host country before 31 December 2000. Investors or companies will receive official confirmation of privileges relating to incentives, market access and equity ownership in writing on approval of their applications.

Section 5
Duration of Privileges

Privileges will, unless otherwise specified in this Memorandum, or at the time of issue of approval, continue for the life of the investment project or such other period as may be specified by individual Member Countries at their websites. This will apply even if there are subsequent changes in the investment or other laws of the host country. If any approved project, under this Memorandum, is not implemented according to the project implementation schedule agreed to between the investor and the host government, during the promotion period, the above privileges may be withdrawn.

Section 6
Contact Points for Further Information and Enquiries

Brunei Darussalam

Brunei Industrial Development Authority (BINA)
Ministry of Industry and Primary Resources
Jalan Menteri Besar 2065
Bandar Seri Begawan
Brunei Darussalam
Tel : (673) 2 383 811
Fax : (673) 2 382 838
Web Site: http://www.brunet.bn/aseansummit/summit.htm
E-mail: BinaL1@brunet.bn

Indonesia

Deputy Chairman for Promotion
Investment Coordinating Board (BKPM)
No. 44, Jalan Gatot Subroto, Jakarta
Indonesia

Tel: (62) 21 525 2008/525 5041
Fax (62) 21 525 4945
Web Site: http://www.bkpm.go.id
E-mail: sysadm@bkpm.go.id

Lao PDR

Committee for Investment and Foreign Economic Cooperation
Luang Prabang Road-Vientaine
Lao People's Democractic Republic
Tel: (856) 21 216 563
Fax: (856) 21 216 563

Malaysia

Investment Promotion Division
Malaysian Industrial Development Authority
Wisma Damansara, Ground 9 & 11 Floor
Jalan Semantan, Damansara Heights
P.O. Box 101618
50720 Kuala Lumpur
Malaysia
Tel: (603) 255 3633
Fax: (603) 255 7970/255 0697/253 8507
Web Site: http://www.mida.gov.my
E-mail: promotion@mida.gov.my

Myanmar

The Office of Myanmar Investment Commission
653-691 Merchant Street
Pabedan Township
Yangon
Union of Myanmar
Tel: (951) 241 918
Fax: (951) 282 101

Philippines

Technical Services Group
Board of Investments
Department of Trade and Industry
Industry and Investments Building
385 Senator Gil J. Puyat Avenue
Makati, Metro Manila
Philippines
Tel: (632) 897 7895
Fax: (632) 895 3978
Web Site: http://www.dti.gov.ph/boi
E-Mail: boitsg@mnl.sequel.net

Singapore

International Policy Group
Economic Development Board
250 North Bridge Road#24-00
Raffles City Tower
Singapore 179101
Tel: (65) 336 2288
Fax: (65) 339 5203
Web Site: http://www.sedb.com
E-Mail: international@edb.gov.sg

Thailand

Investment Service Centre
Office of the Board of Investment
555 Vipavadee Rangsit Road
Jatuchak, Bangkok 10900
Thailand
Tel: (662) 537 8111

Fax: (662) 537 8188
Web Site: http://www.boi.go.th
E-Mail: head@boi.go.th

Vietnam

Ministry of Planning and Investment (MPI)
Investment Legislation and Promotion Department
56 Quoc Tu Giam
Hanoi, Vietnam
Tel: (844) 823 5606/8258142
Fax (844) 845 9271/8232890/8234453
E-Mail: mp-ii@hn.vnn.vn

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The OECD Code of Liberalisation of Capital Movements, 1976

The OECD Code of Liberalisation of Current Invisible Operations, 1976

The OECD National Treatment Instruments, 1976

The OECD Guidelines for Multinational Enterprises Provisions, 1976

The OECD Declaration and Decisions on International Investment and Multinational Enterprises, 1991

UN

The UN Charter of Economic Rights and Duties of States, 1974

The UNCTAD Code: The set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, 1980

The UN Code of Conducts on Transnational Corporations, 1986

MIGA

The Convention on the Establishment of the Multilateral Investment Guarantee Agency, 1985, (MIGA)

The Operational Regulations of the Multilateral Investment Guarantee Agency, 1988

World Bank

The World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992

European Laws and Regulations

Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the Control of Concentrations between undertakings

Bilateral Investment Treaties

Agreement between **the Federal Republic of Germany** and **the Federation of Malaya** Concerning the Promotion and Reciprocal Protection of Investments (signed on 22 December 1960, entry into force on 6 July, 1963)

Treaty between **the Federal Republic of Germany** and **the Kingdom of Thailand** Concerning the Promotion and Reciprocal Protection of Investments (signed on 13 December, 1961, entry into force on 10 April, 1965)

Treaty between **the Federal Republic of Germany** and **the Republic of the Philippines** Concerning the Promotion and Protection of Investments (signed on 3 March, 1964)

Agreement between the Government of **the Kingdom of Norway** and the Government of **the Republic of Indonesia** Concerning the Encouragement and the Reciprocal Protection of Investments (signed on 24 November, 1969, entry into force on 25 August, 1970)

Agreement between **the Kingdom of Belgium** and **the Republic of Indonesia** on the Encouragement and Reciprocal Protection of Investments (signed on 15 January, 1970, entry into force on 17 June, 1972)

Agreement on Economic Co-operation between **the Kingdom of the Netherlands** and **Malaysia** (signed on 15 June, 1971, entry into force on 13 September, 1972)

Agreement on Economic Co-operation between the Government of **the Kingdom of the Netherlands** and the Government of **the Republic of Singapore** (signed on 16 May, 1972, entry into force on 7 September, 1973)

Agreement on Economic Co-operation between the Government of **the Kingdom of the Netherlands** and the Government of **the Kingdom of Thailand** (signed on 6 June, 1972, entry into force on 3 March, 1973)

L' accord entre **la Republique Francaise** et **la Republique d' Indonesie** pour l'encouragement et la Protection des investissements francaise en Indonesie (signed on 14 June, 1973, entry into force on 29 April, 1975)

Treaty between **the Federal Republic of Germany** and **the Republic of Singapore** Concerning the Promotion and Reciprocal Protection of Investment (signed on 3 October, 1973, entry into force on 1 October, 1975)

Agreement between **the government of Singapore** and the government of **the Swiss Confederation** on the Reciprocal Promotion and Protection of Investment (signed on 6 March, 1973, entry into force on 3 May, 1978)

Convention entre le Government de **la Confederation Suiss** et le Gouvernment de **la Republique Indonesienne** concernant l'encouragement et la protection reciproque des investissements (signed on 6 February, 1974, entry into force 9 April, 1976)

Agreement between the Government of **the Republic of Singapore** and the Government of **the Republic of France** Concerning the Promotion and the Protection of Investment (signed on 8 September, 1975, entry into force on 18 October, 1976)

Agreement between the government of **the United Kingdom of Great Britain and Northern Ireland** and the Government of **the Republic of Singapore** for the Promotion and Protection of Investments (signed on 22 July, 1975, entry into force on 22 July, 1975)

L'accord entre le governement de **la Republique Francaise** et le governement de **Malasie** sur la garantie des investissements (signed on 24 April, 1975, entry into force on 1 September, 1976)

Agreement between the Government of **the United Kingdom of Great Britain and Northern Ireland** and the Government of **the Republic of Indonesia** for the Promotion and Protection of Investments (signed on 27 April, 1976, entry into force on 24 March, 1977)

Convention entre le Gouvernement de **la Confederation Suiss** et le Governement de **Malasie** concernant l'encouragement et la Protection reciproque des investissements (signed on 1 May, 1978, entry into force on 9 June, 1978)

Agreement between the Government of **the Republic of Singapore** and **the Belgo-Luxemberg Economic Union** on the Promotion and Protection of Investments (signed on 17 November, 1978, entry into force on 27 November, 1980)

Agreement between the Government of **the United Kingdom of Great Britain and Northern Ireland** and the Government of **the Kingdom of Thailand** for the Promotion of the Investment of Capital and for the Protection of Investments (signed on 28 November, 1978, entry into force on 11 August, 1979)

L'accord entre **l'union economique Belgo-Luxembourgeoise** et le Governement de la **Malasie** relatif a l'encouragement et a la protection reciproque des investissements (signed on 22 November, 1979, entry into force on 8 February, 1982)

Agreement between the Government of **Sweden** and the Government of **Malaysia** Concerning the mutual Protection of Investment (signed on 3 March, 1979, entry into force on 6 July, 1979)

Agreement between the Government of **the United Kingdom of Great Britain and Northern Ireland** and **the Republic of the Philippines** for the Promotion and Protection of Investments (signed on 3 December, 1980, entry into force on 2 January, 1981)

Agreement between the Government of **the Republic of Singapore** and the Government of **the Democratic Socialist Republic of Sri Lanka** (signed on 9 May, 1980, entry into force on 9 May, 1980)

Agreement between the Government of **the United Kingdom of Great Britain and Northern Ireland** and the Government of **Malaysia** for the Promotion and Protection of Investments (signed on 21 May, 1981, entry into force on 21 October, 1988)

Agreement between **the Kingdom of Norway** and the Government of **Malaysia** regarding the mutual Protection of Investments (signed on 6 November, 1984, entry into force on 7 January, 1986)

Agreement between **the Kingdom of the Netherlands** and **the Republic of the Philippines** for the Promotion of Investments (signed on 27 February, 1985, entry into force on 1 April, 1985)

Agreement between the Government of **the Kingdom of Thailand** and the Government of **the People's Republic of China** on Establishment of Joint Committee on Economic Co-operation (signed on 12 March, 1985, entry into force on 12 March, 1985)

Agreement between **the Republic of Austria** and **Malaysia** for the Promotion and Protection of Investments (signed on 12 April, 1985)

Agreement between the Government of **the People's Republic of China** and the Government of **Singapore** for the Promotion and Protection of Investments (signed on 21 November, 1985)

Agreement between the Government of **Finland** and the Government of **Malaysia** for Protection of Investment (signed on 15 April, 1985)

Agreement between the Government of **the People's Republic of Bangladesh** and the Government of **the Kingdom of Thailand** for the Promotion of the Investment of Capital and for the Protection of Investments (signed on 13 March, 1988)

Agreement between the Government of **the Republic of Korea** and the Government of **the Kingdom of Thailand** for the Promotion and Protection of Investments (signed on 24 November, 1989, entry into force on 30 September, 1989)