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**Foreign Direct Investment and Investment Liberalization in Asia:
Assessing ASEAN's Initiatives¹**

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Introduction

In 2007 the Association of South East Asian Nations (ASEAN) celebrated its fortieth birthday. The original founding members, Indonesia, Malaysia, Philippines, Singapore, and Thailand, have subsequently been joined by Brunei Darussalam (1984), Vietnam (1995), Lao PDR and Myanmar (Burma) in July 1997, and Cambodia in April 1999. From a small five state security community ASEAN now comprises an Association with a combined population of 600 million, a GDP of US\$1 trillion and generates annual trade flows in excess of US\$900 million.² Despite its “middle age” milestone, however, ASEAN’s achievements remain the subject of intense debate, as does its role and relevance to a region experiencing rapid change in its economic, social and political composition. Indeed, despite its commitment to realizing economic integration via the “free flow of goods, services, investment and a freer flow of capital,” evidence of deeper economic engagement remains problematic.³

This paper explores ASEAN’s cooperative endeavors in one such area, investment liberalization. Investment liberalization is variously associated with net positive effects on inflows of investment capital, technology transfer, employment, export generation, economic growth and development.⁴ As a net historical beneficiary of investment flows, the paper hypothesizes that ASEAN’s stated commitment to investment liberalization should by now be realizing progress in each of four areas: a). absolute reductions in national autonomy in relation to investment screening and conditionality provisions; b). increased transparency in respect of member-states national investment regimes; c). enhanced standardization and codification of regulatory standards governing investment related provisions across member states; and d) enhanced centralized coordination and decision making in respect of investment governance. Each of these areas is investigated

² ASEAN Secretariat web page < <http://www.aseansec.org/64.htm>>

³ ASEAN Secretariat, “Overview of ASEAN” < <http://www.aseansec.org/64.htm>>

⁴ See UNCTAD, World Investment Report 2003: FDI Policies for Development: National and International Perspectives, United Nations Conference on Trade and Development, New York, pp.87-88. See also, Rahim Quazi (2007), “Economic Freedom and Foreign Direct Investment in East Asia,” Journal of The Asia Pacific Economy. 12(3), August, pp.329-344.

in relation to ASEAN's three primary investment agreements and the ensuing regimes that govern investment provisions and policy practices among member states.

ASEAN's Investment Regime: The Architecture

Foreign investment has been the life-blood of ASEAN's economies. Where goes foreign direct investment (FDI), so goes growth. As Figure 1 indicates, foreign investment is correlated strongly to economic performance and export activity and is responsible for an increasing share of gross fixed capital formation.⁵ Investment promotion has thus been a key policy instrument used by all member states to steer investment into strategic sectors that complement national comparative advantage, promote export activity and employment generation. Recognizing the strategic importance of investment to development, ASEAN was one of the first regional groups in the South to adopt formal instruments that promote and protect cross border investment among nationals of member states. These have comprised two sequentially related agreements that together define the policy architecture of ASEAN's investment regime:

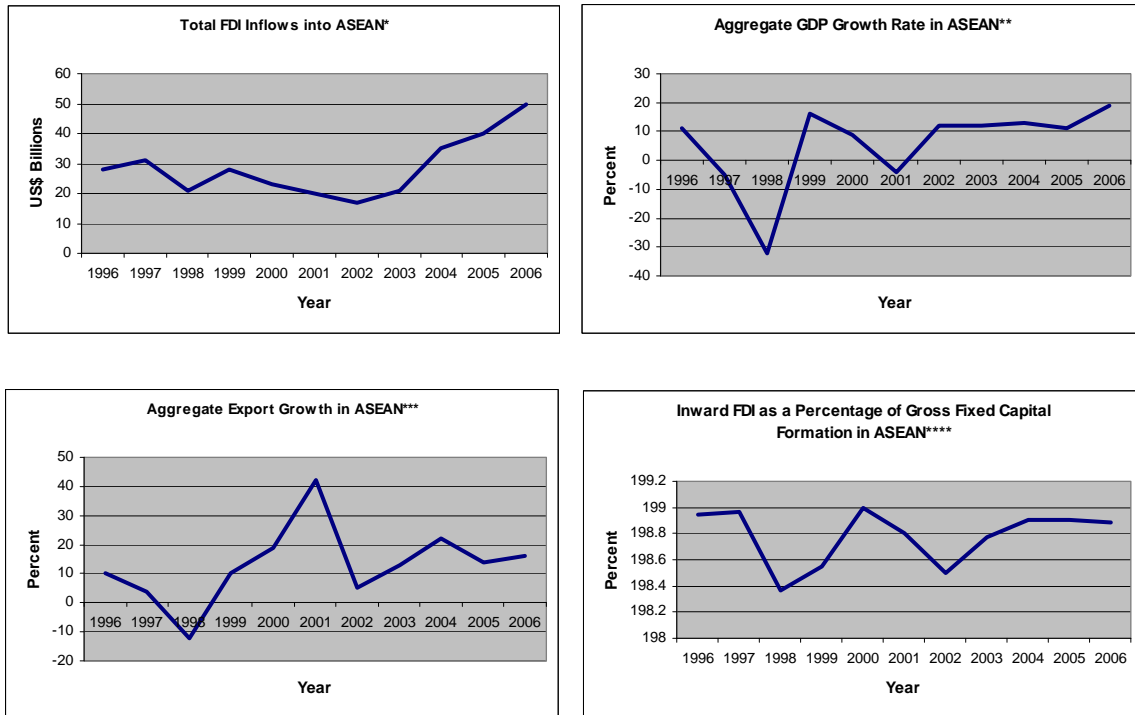
- i) The ASEAN Agreement for the Promotion and Protection of Investments (AAPPI)(1987, 1996)
- ii) The ASEAN Investment Area (AIA) agreement (1998)(Amended 2001).

While each is a formal instrument that speaks to the legal obligations of member states, equally they embody the political aspirations of ASEAN Heads of Government and their stated commitment to grow intra-ASEAN investment as a proportion of total investment flows to the region, facilitate greater ease of movement of capital, technology and knowledge skills, and thus promote equitable development among member states as a means of achieving longer term economic integration through enhancing economic

⁵ Eisuke Sakakibara and Sharon Yamakawa (2003), "Regional Integration in East Asia: Challenges and Opportunities: Part II. Trade, Finance and Integration. Policy Research Working paper 3079. World Bank, East Asia and Pacific Region. Poverty Reduction and Economic Management Sector Unit, pp.18-19.

complementarities.⁶ Much of the weight of ASEAN's success and or failure thus rests on the efficacy of these agreements and the outcomes they realize.

Figure 1: FDI Inflows / Growth / Fixed Capital Formation / Exports⁷



⁶ See the Joint Communiqué The Third ASEAN Heads of Government Meeting. Manila, 14-15 December 1987, Point 29. [ASEAN Secretariat](http://www.aseansec.org/1225.htm). < <http://www.aseansec.org/1225.htm>>

⁷ * Author's calculation using the World Development Indicators, World Bank. In current US dollars. Data for Brunei Darussalam not available/included. Rounded off to the nearest billion. ** Author's calculation using the World Development Indicators, World Bank. In current US dollars term. Data for Myanmar not available/included. Rounded off to the nearest percentage point. *** Author's calculation using the World Development Indicators, World Bank. In current US dollars term. Data for Myanmar not available/included. Data for Singapore from 1995 to 2000 not available/included. Rounded off to the nearest percentage point. **** Author's calculation using World Development Indicators, World Bank. In current US dollars term. Data for Myanmar not available/included. Data for Lao PDR from 1995 to 1999 not available/included. Rounded off to the nearest 1/100th of a percentage point.

I. The ASEAN Agreement for the Promotion and Protection of Investments (AAPPI)

Adopted in 1987 at the ASEAN Heads of Government Meeting in Manila, the AAPPI represents the culmination of a decade long series of negotiations and ASEAN's first multilateral endeavor at enhancing investment cooperation. Its importance lies not just in the architecture it set in place and from which would evolve ASEAN's contemporary investment regime, but also the procedural, cooperative, consultative and dispute processes and procedures that would arise and largely embed themselves in ASEAN's subsequent investment agreements.⁸ The AAPPI thus casts a long shadow over ASEAN's investment regime and the ensuing character of the association's liberalization efforts.

Despite the foundational importance of the AAPPI, the agreement itself is remarkably parsimonious. The protocols of the agreement are confined to three substantive areas, i). stipulation of investor treatment, ii) investor protections and compensation, and iii). disputation mechanisms.

The first of these provisions aspire to a broad set of minimum standards that define the treatment of ASEAN nationals by specifying a "fair and equitable" treatment clause (Article IV) and stipulating that this cannot be less than that granted investors accorded MFN status (most favored nation). Ostensibly, the intent is to discourage discrimination between ASEAN nationals while ensuring them treatment equivalent to MFN status. Further, Article IV stipulates that ASEAN nationals will receive protections in accord with those afforded a host country's own nationals: "each contracting party shall, within its territory ensure full protection of the investments made in accordance with its legislation" and that these "shall not impair by unjustified or discriminatory measures the management, maintenance, use, enjoyment, extension, disposition or liquidation of such investments."⁹ Judicial, political and or legislative measures that unfairly discriminate

⁸ The AAPPI was signed in 1987 between the original six ASEAN states (Indonesia, Malaysia, Philippines, Singapore, Thailand and Brunei). It was subsequently amended in 1996 with the accession of Vietnam to the association.

⁹ AAPPI Agreement, 1987, Article IV:1. [ASEAN Secretariat](#).

against investment from ASEAN nationals are therefore prohibited. This equivalency clause is also extended to the treatment of ASEAN nationals in the event of damages due to hostilities or a state of national emergency. Under the agreement, for example, both domestic and ASEAN investors are afforded the same level of treatment in the case of restitution, compensation or “valuable consideration” with inbuilt measures designed to safeguard the remittance of compensation monies to home country domiciles.¹⁰ The clause, however, does not guarantee compensation and or restitution and is not intended as an instrument of investor indemnity against civil unrest and or political risk.

The second of the provisions in the agreement address investor protections. Two sets of protections are identified: the repatriation of capital and earnings and compensation in the case of expropriation. The former affirms the right of repatriation for all business activities associated with the remittance of net profits, dividends, royalties, interest, dispossession of assets and capital transfers by ASEAN nationals. Article VII also includes the repatriation of proceeds through liquidation of assets, earnings accruing to employees and remittance of all forms of debt settlement by ASEAN nationals. The second of the clauses provides investor indemnity in the case of expropriation by providing ASEAN investors recourse to compensation at fair market values prevailing “immediately before the measure of dispossession became public knowledge,” access to compensation monies “without unreasonable delay,” and commits signatories to assure the transferability of compensation monies in freely-usable currencies.¹¹

Third and finally, the AAPPI specifies disputation mechanisms in the case of disagreement between contracting parties covered by the agreement. Two sets of disputation mechanisms are incorporated into the agreement. The first is a defined arbitration mechanism that allows disputing parties to seek arbitration in specified international arbitration centers.¹² While the agreement makes the disputation

¹⁰ AAPPI Agreement, 1987, Article IV:3. [ASEAN Secretariat](#).

¹¹ AAPPI Agreement, 1987, Article VI:1. [ASEAN Secretariat](#).

¹² Article X clause 2 of the AAPP agreement (1987) nominates the International Centre for the Settlement of Investment Disputes (ICSIDD), the United Nations Commission for International Trade Law, the Regional centre for Arbitration at Kula Lumpur, “or any other centre for regional arbitration in ASEAN,

mechanisms binding on the extant party and vests in the arbitration court a “binding authority” clause, no enforcement mechanism is specified. Partly, this is accommodated in a second default mechanism that refers intransigent disputes to the ASEAN Economic Ministers (AEM) meeting, vesting in the AEM ultimate decision making authority.

Assessing the Impact and Outcomes of the AAPPI

In the Joint communiqué issued at the conclusion of the ASEAN Heads of Government meeting in Manila, 1987, the adoption of the AAPPI was lauded as one of the foundation stones that would propel expansion of intra-ASEAN investment “to at least ten per cent of total foreign investments by the turn of the century.”¹³ Plainly, the AAPPI was viewed as a facilitation mechanism that, overtime, would see year-on-year growth in intra-ASEAN investment and in the process help lay the groundwork for deeper regional integration. As Tables 1 & 2 indicate, however, the AAPPI has fallen short of its original intent, with the level of intra-regional investment remaining stubbornly static — both in dollar terms but also as a percentage of total capital flows to the region. As late as 2005, for example, intra-ASEAN investment accounted for less than 10% of total FDI inflows.

whichever the parties to the dispute mutually agree to appoint for the purposes of Conducting the arbitration.” See AAPPI Agreement, 1987, Article X:2. [ASEAN Secretariat](#).

¹³ Joint Communiqué, The Third ASEAN Heads of Government Meeting, Manila, 14-15 December 1987 (Point 29). [ASEAN Secretariat](#). <<http://www.aseansec.org/1225.htm>>

Table 1: FDI Inflows into ASEAN by Source Country / Region

US\$ Millions

FDI Inflows into ASEAN by Source Country (US\$ Millions)											
Source Country/ Region	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
ASEAN* ^	3,516.90	3,121.70	3,962.90	2,073.10	934.60	714.30	933.00	3,634.00	2,302	2,433.00	3,765.10
EU 15† ††	5,067.10	6,231.20	5,542.90	5,344.30	7,051.10	2,609.30	4,141.70	4,236.00	52,320	5,421.00	11,139.60
USA	2,119.00	4,586.50	6,669.40	3,427.30	4,992.30	2,404.60	3,150.00	358	1,395.00	5,052.00	3,010.60
Total in flows	23,389.40	25,544.40	29,612.30	21,778.60	22,169.70	8,513.60	10,293.30	13,705.00	18,447.00	21,804	41,067.80
ASEAN Intra FDI Inflows as a % of total FDI inflows to the region	15%	12.2%	11.4%	9.5%	4.2%	8.3%	9%	26.5%	12.4%	11.1%	9.1%
* Excludes Cambodia 1995-2004 ^ Includes Cambodia 2005 † Includes EU 15 1995-2004 †† Includes EU 25 2005											

Source: ASEAN Statistical Yearbook, 2003. Jakarta, ASEAN Secretariat; ASEAN Statistical Yearbook, 2006. Jakarta, ASEAN

Secretariat; Foreign Direction Investment Statistics (2007), ASEAN Secretariat. <http://www.aseansec.org/18144.htm>

Table 2: ASEAN foreign direct investment: Net inflow from selected partner countries/regions

(Value in US\$ million; share in percent)

Partner country/region	Value				Share to total net inflow			
	2004	2005	2006	2002-2006	2004	2005	2006	2002-2006
ASEAN	2,803.7	3,765.1	6,242.1	19,377.7	8.0	9.2	11.9	11.3
USA	5,232.4	3,010.6	3,864.9	13,736.1	14.9	7.3	7.4	8.0
Japan	5,732.1	7,234.8	10,803.3	30,813.7	16.3	17.6	20.6	18.0
European Union (EU)-25 ^{1/}	10,046.1	11,139.6	13,361.9	44,955.6	28.6	27.1	25.5	26.3
China	731.5	502.1	936.9	2,302.9	2.1	1.2	1.8	1.3
Republic of Korea	806.4	577.7	1,099.1	3,347.3	2.3	1.4	2.1	2.0
Australia	566.7	195.9	399.2	1,444.3	1.6	0.5	0.8	0.8
India	118.7	351.7	(380.4)	295.1	0.3	0.9	(0.7)	0.2
Canada	301.2	161.3	274.0	1,184.9	0.9	0.4	0.5	0.7
Russia ^{2/}	-	-	5.6	n.a	n.a	n.a	n.a	n.a
New Zealand	3.5	480.7	(282.8)	392.1	0.0	1.2	(0.5)	0.2
Pakistan	4.8	3.5	7.8	16.8	0.0	0.0	0.0	0.0
Total selected partner countries/regions	26,347.1	27,422.9	36,331.7	117,866.4	75.0	66.8	69.4	69.0
Others ^{3/}	8,770.1	13,644.9	16,047.9	52,955.4	25.0	33.2	30.6	31.0
Total	35,117.2	41,067.8	52,379.5	170,821.9	100.0	100.0	100.0	100.0

Notes

- not available as of publication time
- x not available/not compiled
- n.a. not applicable
- 0.0 less than 0.1 %

- 1/ includes Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and United Kingdom
- 2/ no separate data available; included in 'Others'
- 3/ includes inflow from all other countries, including Russia, as well as total reinvested earnings in the Philippines (local banks only) for 2002-2006

Source: ASEAN Foreign Direct Investments Database (compiled from data submission of central banks, national statistical offices and other relevant government agencies): ASEAN Secretariat, Jakarta.

While there are countless factors that impact investment flows making it hard to apportion causality and or correlate variables with any degree of accuracy, the evidence suggesting a positive impact of the AAPPI is hard to discern. Part of this reflects the limited and circumscribed nature of the agreement itself and part structural flaws in the agreement which fail to address underlying issues associated with investment regime transparency or the removal of national barriers to investment entry. More obviously, the agreement also reveals fundamental tensions between, on the one hand, the intent to create standards of equivalency in the treatment of ASEAN nationals while, on the other, preserving national autonomy over investment policy. These conflicting agendas doubtlessly contributed both to the protracted decade long negotiations leading to the adoption of the agreement and its problematic impact on intra-ASEAN investment flows.¹⁴

Tensions and Contradictions: Nationalism versus Regionalism

The obvious shortcoming of the agreement lies in its inability to effectively negotiate a mechanism to decouple competitive national investment agendas from broader objectives aimed at creating region wide standards in the entry and treatment privileges afforded ASEAN nationals. Specifically, the failure of the agreement to identify a regional mechanism to protect developing domestic industries from parallel - competitive ASEAN investments condemned the agreement to its current form; one that essentially enshrines national autonomy in respect of investment policy and investor treatment. The agreement, for example, affirms the centrality of autonomous national screening processes, allowing member states to leave untouched national requirements for investors to obtain written host government approval and or to impose registration and annual renewal requirements on foreign investment. So too, the AAPPI does not delimit the conditionality rights of

¹⁴ Negotiations to explore the possibility of formalizing an ASEAN investment agreement were commenced soon after the Second ASEAN Heads of Government meeting in Kuala Lumpur, August, 1977, when the joint communiqué urged the commencement of bilateral agreements on investment guarantees between ASEAN members and “directed that measures be taken to stimulate the flow of technology, know-how and private investments among the member countries.” Joint Communiqué. The Second ASEAN Heads of Government Meeting, Kuala Lumpur, 4-5 August 1977, communiqué points 16 & 25. ASEAN Secretariat, Jakarta. <<http://www.aseansec.org/1224.htm>>

member states, allowing them to impose point of entry and operating conditions on investments and or discriminate through various tax, concessional or incentive systems as a means of directing or selecting investments deemed to be beneficial to the host country. Importantly, this preserves the ability of member states to screen foreign investment and to shelter domestic investment from intra-regional investment competition. In short, the agreement does not grant investors a right of entry to member states but speaks more generally to *post*-entry standards of treatment once approval for the investment has been given by the host country.

Even in the case of post-entry standards of treatment, however, the AAPPI tends to preserve national discretionary autonomy, allowing states to withhold or confer national treatment to foreign investors on an ad-hoc basis. Indeed, there is an obvious tension in the agreement between clauses stipulating equivalency standards in the treatment of ASEAN nationals, and broad exclusion clauses that seek to delimit the scope of equivalency treatment. Article IV: 4, for example, notes that “any two or more of the contracting parties *may negotiate* [my emphasis] to accord national treatment” but further adds that “nothing herein shall entitle any other party to claim national treatment under the most-favored-national principle.”¹⁵ Clearly, signatories to the agreement were not willing to grant national treatment even to ASEAN investors except on a case-by-case basis and subject to host country approval.¹⁶ This provides signatory states with the latitude to specify modes of treatment and or impose delimitations on foreign investors as deemed appropriate. More obviously, making this clause beyond the scope of MFN consideration preserves the ability of member states to maintain a dual investment regime able to discriminate between domestic and foreign investors.

If examined closely, the AAPPI even preserves member state discretion in respect of rights to expropriate foreign invested assets. Article VI:1, for example, allows states to invoke a “public use, or public purpose, or . . . public interest” clause in the case of state

¹⁵ AAPPI Agreement, 1987, Article IV:4 [ASEAN Secretariat](http://www.aseansec.org/6464.htm). <<http://www.aseansec.org/6464.htm>>

¹⁶ Lawan Thanadsillapakul (2001), “International Investment Law: The Investment Regime of ASEAN Countries,” [Thailand Law Source](http://members.tripod.com/asialaw/articles/lawaninvestment.html): Members Tripod. <<http://members.tripod.com/asialaw/articles/lawaninvestment.html>>

expropriation only stipulating a “fair market value” compensation clause. Missing from the agreement, however, is any definitional clarity as to what constitutes “public use” or “public purpose,” presupposing that member states may invoke this clause unchallenged or at least absent a mechanism to effectively investigate the rectitude of the action itself. It also precludes any legal challenge to an act of “public use” expropriation by an ASEAN investor, privileging the actions of the member state and guaranteeing state discretion. And while compensation is guaranteed ASEAN nationals in the case of expropriation, the technical means via which “fair market” value is to be determined or the appeal mechanism available to the investor to challenge this remain opaque — as does the compliance and enforcement mechanisms available to the investor.

This, perhaps, is the most telling omission in the agreement; the absence of rule based dispute settlement procedures for foreign investors and the failure to vest ultimate decision making authority in a non-political non-partisan body. By default, the AEM has ultimate juridical authority over intransigent disputes. This makes dispute settlement a process of protracted political and bureaucratic negotiation and obfuscates the use of rule based processes informed by technical, objective assessment criteria. The effectiveness of the investment guarantees and their availability to ASEAN investors is thus rendered problematic.¹⁷

Finally, the AAPPI leaves un-touched issues associated with the transparency of the investment regime or the standardization and formal codification of the regulatory regime responsible for oversight and governance of investment. Again, deference to national proclivities tended to arrest the development of transparent protocols across the membership base and limit the emergence of more effective intra-ASEAN investment coordination. Under the auspices of the AAPPI, for example, even the development of a centralized ASEAN repository providing information about the regulatory standards and compliance protocols for investors proved unfruitful. As before, navigating the rules

¹⁷ Alyssa Greenwalk (2006), “The ASEAN-China Free Trade Area (ACFTA): A Legal Response to China’s Economic Rise,” Duke Journal of Comparative and International Law, 16:193, pp202-209.

concerning the entry and operational compliance obligations of investors continued to rest with national authorities and be defined by non-uniform national standards.

AAPPI: The 1996 Emendations

Despite the shortcomings of the agreement and its problematic impact on intra-ASEAN investment flows, the AAPPI operated for nearly a decade before emendations were ratified in 1996. These were triggered in part by the accession of Vietnam to full membership of the association (July, 1995) and, in part, by perceptions about the veracity of the agreement and the need to quicken the pace of investment cooperation. Two substantive emendations were incorporated into the amended agreement. Article 3 related to issues of transparency and “predictability” of investment laws and Article 4 to dispute settlement mechanisms.¹⁸ Article 3, in particular, spoke to the lack of investment transparency that by 1996 warranted deliberative corrective measures. More generally, the haphazard and superficial level of investment coordination under the AAPPI had been visceral and a point increasingly raised at ASEAN ministerial meetings. The twenty-sixth ASEAN Foreign Ministers meeting in July, 1993, for example, highlighted concerns about the apparent international trend toward deeper regionalism and coordination in blocs like the European Union and NAFTA, while intimating that similar developments would need to be realized in ASEAN if growth trajectories were to be sustained. Similarly, by the time of the AEM meeting in Brunei in September, 1995, there was a general sense of urgency with regard to speeding up trade and investment liberalization and that ASEAN would need “to move faster”.¹⁹ Article 2 of the amended AAPPI thus urged members to “endeavour to simplify and streamline its investment procedures and

¹⁸ Protocol to Amend the Agreement among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments. Jakarta, September 12, 1996. ASEAN Secretariat. <<http://www.aseansec.org/6465.htm>> The other Articles in the amended protocol of the AAPPI refer to procedural issues related to the accession of new members and the deposit of articles with the ASEAN Secretariat.

¹⁹ See the “Joint Communiqué of the Twenty-Sixth ASEAN Ministerial Meeting, Singapore, 23-24 July, 1993. ASEAN Secretariat. Jakarta, Indonesia. Joint Press Statement of the 27th ASEAN Economic Ministers Meeting (AEM), Bandar Seri Begawan, Brunei Darussalam, 7-8 September, 1995. ASEAN Secretariat. Jakarta, Indonesia. <<http://www.aseansec.org/2116.htm>>

approval processes [in order]to facilitate investment flows,” and further stipulated in Article 3 that:

Each contracting party shall ensure the provision of up-to-date information on all laws and regulations pertaining to foreign investment in its territory and shall take appropriate measures to ensure that such information be made as transparent, timely and publicly assessable as possible.²⁰

Both emendations essentially gave the game away, revealing within the agreement itself its tacit reification of national standards and proclivities in setting investment policy yet appealing to member states to enhance the level of transparency of their investment regimes. In a sense, the pretext of cooperative, regionally based investment protocols that the AAPPI was meant to harbour, were set aside. By and large, the agreement now became a more explicit aspirational statement of goals concerning investment cooperation and appeals to members to codify, simplify and publish their investment laws in a manner that would make them more transparent and accessible to ASEAN nationals.

The one area where progress did appear to be gaining traction concerned the development of the “ASEAN Protocol on Dispute Settlement Mechanism” (APDSM), which Article 4 of the amended AAPPI noted would henceforth apply to the settlement of disputes. While notionally a move toward initiating a rules based dispute settlement system and attempting to decouple dispute procedures from political cum bureaucratic negotiation, the APDSM remained in limbo for several years and was never ratified. The then ASEAN Secretary-General, Ong Keng Yong, explained the failure to immediately ratify the protocol on perceptions that it was “ineffective because of its excessive bureaucratic nature.”²¹

²⁰ Protocol to Amend the Agreement among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments. Jakarta, September 12, 1996. ASEAN Secretariat. <<http://www.aseansec.org/6465.htm>>

²¹ ASEAN Secretary-General Ong Keng Yong as quoted in Alyssa Greenwald (2006), “The ASEAN-China Free Trade Area (ACFTA): A Legal Response to China’s Economic Rise,” Duke Journal of Comparative & International Law. 16(193), p.207. Only in November, 2004, did ASEAN adopt a formal dispute resolution mechanism titled the “ASEAN Protocol on Enhanced Dispute Settlement Mechanism.” ASEAN Secretariat.

AAPPI: Triumph of Nationalism over Regionalism?

In terms of the four criteria outlined at the commencement of the paper, the AAPPI (1987,1996) obviously fails on each. The AAPPI preserves the ability of member states to engage in competitive investment promotional measures, investment screening, and impose conditionality clauses on the operational parameters of foreign investment in the context of a dual investment regime. Its impact should thus be assessed in terms of a circumscribed set of minimum standards defining compensation, restitution and repatriation principles that provide government guarantees to ASEAN nations in terms of the transfer of capital, profits, earnings, and debt settlement. It is, in this sense, ASEAN's introductory foray aimed at mitigating the most obvious forms of political risk for ASEAN nationals while preserving the juridical sanctity of domestic based investment regimes and state autonomy in respect of foreign investment policy.

Jakarta. <<http://www.aseansec.org/16754.htm>>. In 2004 the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (APEDSM) was eventually ratified.

Figure 2: Major Features of the AAPPI (1987)(1996)

	Present	Absent	Implementation / administrative authority: N= National R = Regional / ASEAN Secretariat
Non-discrimination clause	√		N
Fair & Equitable treatment clause	√		N
MFN Clause	√		N
National treatment clause		√	-
Rules based disputation Mechanism		√*	R
Rules based dispute resolution process via independent body		√	
Treaty review mechanism		√	-
Independent administering entity / central statutory authority		√	-
Codified treaty reporting processes		√	N,R
Termination mechanism	√		N
National host country approval / registration required for FDI	Yes		
Allows national autonomous imposition of conditionality clauses on FDI	Yes		
Allows for autonomous national screening of FDI	Yes		

* Attempted as part of the “ASEAN Protocol on Dispute Settlement Mechanism (1996).

II. The ASEAN Investment Area (AIA) Agreement

The ASEAN Investment Area (AIA) agreement is the most comprehensive statement struck by ASEAN on investment liberalization to date.²² Ratified in October, 1998 and amended in 2001, the AIA embodies a series of “schemes, action plans and specific programs” that define the contemporary contours of ASEAN’s investment regime.²³ Its coverage extends to various forms of foreign direct investment, excluding portfolio investment or investment pertaining to matters falling under the ASEAN Agreement on Services.²⁴

The key instruments in the agreement are contained in Article 7 and cover four main areas. The first speaks to an immediate liberalization of all “industries for investments by ASEAN investors” except for sectors listed on a temporary exclusion list (TEL) or sensitive list (SL). The second sets in place a “national treatment” clause in respect of “all industries and measures affecting investment . . . the admission, establishment, acquisition, expansion, management, operation and disposition of investments.” The third pillar specifies the procedural mechanisms in respect of sector / industry nomination for the inclusion of sectors on the TEL and SL lists. Specifically, Article 7 sets in place a time-line for the phase out of the TEL (2010), except for Laos and Vietnam (2013) and Myanmar (2015). Article 7 also stipulates procedures for the recurrent review of the TEL and SL lists via a newly formed ministerial level AIA Council responsible for oversight, coordination and implementation of the AIA among member states.²⁵ Finally, and

²² See the “Framework Agreement on the ASEAN Investment Area (AIA),” October 7, 1998, Makati, Philippines. ASEAN Secretariat. <<http://www.aseansec.org/7994.pdf>>. See also “Protocol to Amend the Framework Agreement on the ASEAN Investment Area,” Ha Noi, 14 September 2001. ASEAN Secretariat <<http://www.aseansec.org/6467.htm>>.

²³ ASEAN Secretariat (ND), Handbook of Investment Agreements in ASEAN. ASEAN Secretariat, Jakarta, p.3. < <http://www.aseansec.org/12814.htm>>

²⁴ See the ASEAN Framework on Services Agreement, Bangkok, December 15, 1995. ASEAN Secretariat, Jakarta. < <http://www.aseansec.org/19087.htm>>. Protocol to Amend the ASEAN Framework Agreement on Services, Phnom Penh, Cambodia, 2 September 2003. ASEAN Secretariat, Jakarta. < http://www.aseansec.org/AFAS_Amendment_Protocol.pdf>

²⁵ Kee Hwee Wee Hafiz Mirza (2004), “ASEAN Investment Cooperation: Retrospect, Developments and Prospects,” in Nick J. Freeman and Frank L. Bartels (eds.), The Future of Foreign Direct Investment in Southeast Asia. London and New York: Routledge, p.209.

notably, the AIA agreement provides the first tangible set of provisions for improving investment transparency among member states, stipulating procedural mechanisms and reporting requirements for signatories concerning the rules, regulations and ordinances governing investment provisions and which impact the AIA agreement. These also extend to bilateral investment agreements entered into by member states with a requirement to disclose “promptly and at least annually” changes to the regulatory provisions governing investment.²⁶

Subsequent emendations to the agreement in September, 2001, did not alter the tenor of the agreement but did stipulate its specific coverage. Where the original AIA agreement specified *all* industries, the amended protocol stipulated sector coverage exclusive to direct investments and services incidental to (a) manufacturing; (b) agriculture; (c) fishery; (d) forestry; (e) mining and quarrying.²⁷ In addition, the 2001 protocol accelerated the phase out of the TEL for the manufacturing sector to 2003 (except for Cambodia, Laos, Vietnam, 2010).

The AIA and Investment Liberalization: Fact or Fiction?

Despite being the most comprehensive agreement on investment liberalization produced by ASEAN, the AIA speaks to a series of tensions concerning nationalist economic protectionism, growth objectives and, more broadly, philosophical debates about the role of state sponsorship in the promotion of domestic multinational enterprise (MNE). Set amid a backdrop of regional economic turmoil and financial crises, the ratification of the agreement in 1998 betrayed concerns over the ability of ASEAN member states to continue to attract large inflows of FDI, maintain growth and employment and quell increasing levels of political discontent. While the negotiations leading to the adoption of the AIA preceded the regional financial crisis, the speed of its adoption and the unilateral implementation of various measures contained in the agreement prior to its formal

²⁶ Article 11, Framework Agreement on the ASEAN Investment Area, October 8, 1998. [ASEAN Secretariat](http://www.aseansec.org/2280.htm). <<http://www.aseansec.org/2280.htm>>

²⁷ Protocol to amend the Framework Agreement on the ASEAN Investment Area, Ha Noi, 14 September, 2001. [ASEAN Secretariat](http://www.aseansec.org/6467.htm). <<http://www.aseansec.org/6467.htm>>

ratification, reveal an environment fraught with anxiety. Malaysia, for example, strongly supported the AIA but principally as a means of nurturing domestic Malaysian capital, whereby ASEAN's regional market would provide the economies of scale and testing ground for Malaysian enterprise to launch onto the world stage. Indonesia too saw the AIA as a means of forging "ASEAN conglomerates" by privileging ASEAN investors over other foreign direct investors. One senior official in the ASEAN Secretariat, for example, noted that ASEAN "saw the need to develop regional MNCs using the grace period [clause] before foreign investors would be accorded the same privileges."²⁸ Rather than being conceived strictly as a means of investment liberalization, the AIA was instead embraced as a means of protecting and advantaging regional enterprise in readiness to compete with Western multinational conglomerates. At one and the same time, the AIA thus represents a medium for investment liberalization and regional protectionism.

These competing policy concerns explain the contradictions evident in the various articles of the AIA. The instigation of a coordinating authority in the form of an AIA Council, for example, marked a significant step forward in institutionalizing investment coordination as a central pillar of ASEAN's 2020 vision to develop an economic community. More obviously, it reflected the previous haphazard approaches to investment facilitation and policy coordination / implementation, much of which had been left to national discretion and the pitfalls of dissimilar national institutional capacity. In adopting the AIA and the institutional architecture of the AIA Council, ASEAN members signaled their intention to get serious about policy coordination, investment policy harmonization, and to make more transparent their national investment regimes. Indeed, the ministerial level AIA Council moved quickly to institutionalize its processes, forming a Coordinating Committee on Investment (CCI), regularly meeting four to five times a year to oversee policy coordination and implementation, discuss regional investment matters and coordinate investment promotion. Likewise, the instigation under the auspices of the AIA Council of a Working Group on Foreign Direct Investment

²⁸ Helen E.S. Nesadurai (2003), Globalization, Domestic Politics and Regionalism: The ASEAN Free Trade Area. London: Routledge, p.113.

Statistics(WGFDIS), marked for the first time the adoption of formal procedural mechanisms to harmonize FDI data collection and measurement and thus provide annualized comparative regional FDI data to the AIA Council and policy planners.²⁹

While the AIA marks a significant advance in terms of the institutional environment governing intra-regional investment, the articles of agreement and their impact on investment liberalization are more problematic. For example, while the AIA accelerated the phase out schedule for the TEL (ASEAN 6, 2003; Vietnam, Laos, Cambodia, Myanmar, 2010) it left indefinite the phase out period for the SL, allowing national discretion in the nomination of sectors to the list and only suggesting that this would be periodically reviewed via the AIA council. Likewise, the commitment of member states to intra-ASEAN investment liberalization seemed to wane as the regional financial crisis subsided. Article 1 of the 2001 “Protocol to Amend the Framework Agreement on the ASEAN Investment Area (AIA),” for example, seemed to step back from a default blanket clause covering “all” industries to a more exclusionist language covering only named sectors (manufacturing, agriculture, fishery, forestry, mining & quarrying sectors). That the intent was to circumscribe coverage is revealed in Paragraph 3, Article 1, which states the “agreement shall further cover direct investments in such other sectors and services incidental to such sectors as may be agreed upon by all Member States.” What remains unnamed in the AIA thus speaks strongly to the inability of ASEAN to address intra-regional investment liberalization in strategic sectors like, for example, telecommunications, financial services, infrastructure, transportation, or print, electronic and broadcast media, where national conditionality clauses and or protectionist restrictions remain strong.³⁰

The impact of the AIA is also problematic in terms of its stated achievements to roll back closed and or restricted sectors to foreign investment and the apparent progress in removing or de-listing sectors from the TEL and SL lists. Indeed, there is ample evidence to suggest that investment protectionism or sectoral sheltering persists among many

²⁹ Kee Hwee Wee & Hafiz Mirza (2004), *op.cit.*, p.209.

³⁰ Protocol to amend the Framework Agreement on the ASEAN Investment Area, Ha Noi, 14 September, 2001. ASEAN Secretariat. <<http://www.aseansec.org/6467.htm>>

ASEAN states. As Appendices I and II highlight, for example, the TEL and SL lists for various countries continue to be populated by numerous industry sectors where investment is either prohibited and or subject to stringent conditionality clauses delimiting investment access. Likewise, the TEL and SL lists for services incidental to the manufacturing, agricultural, fishery, forestry mining and quarrying sectors (Appendix II), also continues to be heavily populated and or subject to stringent conditionality requirements, including ceilings on foreign equity participation, joint venture (JV) requirements, forced government business cooperation contracts (BCC), directed sourcing requirements, domestic market access restrictions and or export only clauses, stipulated land use provisions, or various approvals and or screening requirements that place discretionary authority for investment approval in the hands of regional and local agencies — many of which have stipulated non-dislocation clauses to local populations as part of their approval requirement processes. In the case of the Philippines, Indonesia, Vietnam, and Lao PDR, for example, the sectoral inclusion and conditionality clauses speak openly to restricted investment access that affects small and medium size enterprise in the manufacturing, forestry, fishery, agriculture and mining sectors. Equally, the retailing, food and beverage processing / manufacturing sector, construction and allied services, electronic component manufacturing, hospitality, hotel and tourism sectors are all typically restricted or prohibited on the basis of being “reserved for domestic SMEs”. Far from an open investment regime, many of ASEAN’s member states continue to utilize protectionist measures despite the stated ambitions of the AIA.

The TEL and SL lists, however, do not betray the full extent to which investment screening and tacit investment protectionism persists among ASEAN states. Two factors would seem to be at work in this respect. First, regional political pressures and the need to “keep up appearances” in terms of moving the AIA forward and achieving aspirational targets, is doubtlessly leading to under-reporting of investment conditionality clauses and restrictions. While the ASEAN Secretariat thus dutifully carries the TEL and SL lists provided by member states, when crossed checked against the investment stipulations required at point of entry by the relevant national authorities, wide discrepancy appears to exist between the stated restrictions and or conditionality requirements listed with the

ASEAN Secretariat. Second, the compliance requirements stipulated by the AIA in terms of the phasing out of the TEL list by 2003 (except for Cambodia, Laos, Vietnam, 2010) and ratified as part of the 2001 amended AIA agreement, appears to have produced a flurry of re-classifications and redesignations. Vietnam, for example, publishes a “temporary exclusion list” in which it designates “nil” sectors under the categories of “Industries closed to both national and foreign investors.” However, in the same “nil” excluded sectors it proceeds to list 24 sectors where industries are open but with restrictions to foreign investors including ASEAN nationals. A further 24 sectors are listed on Vietnam’s SL list and either subject to prohibition or BCC, equity and export only requirements.³¹ Likewise, while Indonesia does not publish a “temporary exclusion list” in line with the 2003 phase out agreement under the Amended 2001 AIA protocol, it does publish Presidential regulations that essentially circumvent the TEL list. Presidential Regulation Number 77, for example, proscribes prohibitions, conditionality clauses and “reserved” sectors in a document that runs to some 57 pages and lists over 25 sectors “closed” to foreign investment, 121 sectors “open to investment with conditions” and or reserved for domestic small and medium sized enterprise, 36 sectors where investment requires a domestic JV partnership, 129 sectors where capital ownership restrictions and or foreign equity ceilings are imposed, 20 sectors where location restrictions are imposed, 26 sectors where “special permits” are required, 48 sectors with 100% domestic capital requirements and 17 sectors where combined foreign capital ownership ceilings and locality requirements are imposed.³²

Similar trends are also apparent in the case of Malaysia and Thailand who no longer publish a temporary exclusion list and or claim “nil” inclusion in terms of prohibited sectors, but have ramped up the SL list and or moved to a series of increasing conditionality clauses that range from restricted geographic zones and location clauses, equity restrictions, directed sourcing requirements and or restricted market access and

³¹ “Temporary Exclusion List for the Opening up of Industries from the Manufacturing, Agriculture, Fishery, Forestry, Mining and Quarrying Sectors: Vietnam,” ASEAN Secretariat, Jakarta. <http://www.aseansec.org/18657.htm>.

³² Presidential Regulation of the Republic of Indonesia, Number 77 of 2007, Concerning the list of lines of Business Closed and Open with Conditions of Investment. Republic of Indonesia. <http://www.bkpm.go.id/en/downloads/31>

export quota requirements. Perhaps more obvious, however, has been the trend to default blanket investment screening where obligations under the AIA are ostensibly adhered to in terms of non-published investment restrictions and or closed sectors, but where all foreign investment is subject to a national approvals and or permit approvals process. Thailand, Malaysia and Singapore have each adopted this model, driven mostly by a desire to attract finite pools of extra-regional FDI and appear “open for business.” This “knock on the door and ask” type policy approach has undoubtedly been highly successful and proven an attractive investment promotion device.³³ But to what degree it represents investment liberalization is questionable. Investment screening, approvals processes, compliance requirements and conditionality clauses keep the state front-and-centre in overseeing foreign investment and able to shelter sectors and or industries from investment competition. What it does do, however, is give the appearance of investment liberalization if only by usurping the need to proscribe prohibitions and or restrictions on investment. In the context of the AIA, much of its claimed progress might thus be ascribed to mechanisms such as this.

Two trends thus appear evident in the case of the impact of the AIA. First, a combination of reclassification and redesignation has seen the migration of nominated sectors from the TEL to SL lists and or sectors previously “closed” now listed as “open” but with stringent conditionality clauses that effectively renders them protected. Second, policy changes in some ASEAN states toward a non-proscribed investment regime reliant on permit and approvals processes and thus a default investment screening system, has removed the need for blanket investment prohibitions and or “closed” sectors while leaving intact national discretion in investment screening. These two trends are significant since they betray a series of policy failures associated with the AIA. Specifically, it highlights the failure of the AIA to nurture the emergence of a more centralized investment governance regime mediated through regional authorities or to effectively coordinate national investment regimes in a way that produces more systematic standardization of national investment provisions. Rather than restrain national discretionary investment screening or

³³ OECD (2004), International Investment Perspectives. Organisation for Economic Cooperation and Development, 2004 Edition, Paris, p.93.

the imposition of conditionality clauses, the AIA continues to display weaknesses that allow it to be outmaneuvered by protectionist domestic political constituencies. Despite the decade long operation of the AIA, its impact on investment liberalization must thus be judged as problematic.

Figure 3: Major Features of the AIA (1998, 2001)

	Present	Absent	Implementation / administrative authority: N= National R = Regional / ASEAN Secretariat
Non-discrimination clause	√		N
National treatment clause	√*		-
Rules based dispute resolution process via independent body		√**	
Treaty review mechanism		√	Non-formalized but can be instigated via the AIA council
Independent administering entity / central statutory authority	√		R (AIA Council endowed with coordinating function but subject to approval of the ASEAN Economics Ministers)
Codified treaty reporting processes	√		N,R (stipulated annualized reporting of national investment regulations to AIA Council)
Termination mechanism	√		N
National host country approval / registration required for FDI	Yes (various requirements as stipulated by national governments)		
Allows national autonomous imposition of conditionality clauses on FDI	Yes under the TEL and SL lists		
Allows for autonomous national screening of FDI	Yes		

* It is unclear to what extent the “National Treatment clause” is universally applied since the coverage of the AIA agreement is limited to stipulated industry sectors (manufacturing, agriculture, fishery, forestry, mining & quarrying sectors).

** The AIA does not contain a dedicated dispute settlement mechanism within the agreement but the agreement comes under the auspices of the Protocol on Dispute Settlement Mechanism (1996) and as of 2004 the ASEAN Enhanced Dispute Settlement Mechanism. Neither of these mechanisms contained firm-state dispute settlement mechanisms.

Intra-ASEAN Investment Patterns and the AIA

Perhaps most disappointing and illustrative of the failure of the AIA to fundamentally transform ASEAN's investment regime, is the near stasis in the composition and distribution of intra-regional investment flows. Despite proclamations announcing reduced barriers to entry and ease of access for ASEAN nationals, the evidence appears to be to the contrary with intra-ASEAN investment flows remaining largely unchanged, interspersed only by gyrations associated with the Asian financial crisis in the late 1990s, the tech sector meltdown of 2001 and the impact of SARs in 2003-4.³⁴ Tables 3 and 4, for example, reveal little evidence that the AIA is leading to enhanced investment penetration among ASEAN states. Rather, two obvious and concerning trends appear evident. First, the predominance of inflows to Malaysia, Singapore and Thailand. Over the 10 year period from 1995 to 2004, for example, Malaysia averaged 22.86% of all intra-ASEAN FDI inflows, Singapore 24% and Thailand 22.9%. Just three of ASEAN's ten member states, in other words, absorb the vast bulk (some two thirds) of intra-regional investment. Country of origin data in the case of intra-ASEAN FDI indicates an analogous pattern with Singapore accounting for upwards of 62.6% of Intra-ASEAN investment outflows between 1995 and 2003, while Malaysia averaged 16.3%. Just two of ASEAN's ten member states thus accounted for nearly 80% of investment capital flowing into the rest of ASEAN.

³⁴ Severe acute respiratory syndrome (SARS).

Table 3: Inward Intra-ASEAN FDI: by country of destination: 1995-2004 (US\$ Millions)

Host Country	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Brunei	311.32	353.12	384.94	247.18	4.27	10.59	10.6	21.23	36.79	25
% of Total ASEAN	6.7%	8.26%	7.35%	8.84%	0.19%	0.74%	0.40%	0.58%	1.59%	1.05%
Cambodia	-	-	-	-	-	-	-	9	20	32
% of Total ASEAN	0%	0%	0%	0%	0%	0%	0%	0.24%	0.86%	1.34%
Indonesia*	608.88	193.33	272.48	-38.36	-427.83	-232.55	-239.98	1336.62	383.96	32
% of Total ASEAN*	13.1%	4.52%	5.2%	—	—	—	—	36.76%	16.68%	1.34%
Laos	6.53	102.57	64.36	28.34	31.36	13.72	3.06	7.89	2.98	8
% of Total ASEAN	0.14%	2.40%	1.22%	1.01%	1.41%	0.96%	0.11%	0.21%	0.12%	0.33%
Malaysia	1676.54	1475.8	2261.49	469.94	535.99	258.12	79.99	0.02	251.12	980
% of Total ASEAN	36.2%	34.5%	43.19%	16.88%	24.17%	18.08%	3.0%	—	10.91%	41.24%
Myanmar	96.7	228.6	323.3	153.9	41.2	74.02	67.36	25.11	24	12
% of Total ASEAN	2.0%	5.35%	6.17%	5.50%	1.85%	5.18%	1.41%	0.69%	1.04%	0.5%

Philippines	241.59	74.88	142.87	106.89	110.92	126.53	222.3	37.94	175.1	116
% of Total ASEAN	5.2%	1.84%	2.72%	3.82%	5.0%	8.86%	8.44%	1.04%	7.60%	4.88%
Singapore	1165.07	1206.71	941.57	794.57	632.1	353	356.9	774	637	649
% of Total ASEAN	25.1%	28.2%	15.19%	28.41%	28.5%	24.7%	13.56%	21.29%	27.68%	27.3%
Thailand	160.56	308.1	297.5	569.6	572.04	389.03	1650	1223	670	336
% of Total ASEAN	3.46%	7.2%	5.68%	20.37%	25.8%	27.2%	62.69%	33.6%	29.1%	14.14%
Vietnam	387.25	328.7	547.2	398.7	289.26	202.39	241.49	200.43	100.4	243
% of Total ASEAN	8.36%	7.6%	10.45%	14.25%	13.0%	14.1%	9.17%	5.51%	4.36%	10.2%
Total*	4627.41	4271.81	5235.71	2796.12 (-38.36)	2217.14 (-427.83)	1427.4 (-232.55)	2631.7 (-239-98)	3635.24	2301.08	2376

* Negative values in terms of net outflows of FDI have not been imputed into the calculations.

Source: ASEAN Foreign Investment Statistics, ASEAN Secretariat, Jakarta.

Table 4: Outward Intra-ASEAN FDI by country of Origin: 1995-2003 (US\$ Millions)

Source Country	1995	1996	1997	1998	1999	2000	2001	2002	2003
Brunei	85.67	146.73	36.21	67.23	18.74	24.54	41.33	17.96	9.13
% Total of ASEAN	1.87%	3.43%	0.69%	2.46%	1.03%	1.79%	1.68%	0.50%	0.54%
Cambodia	1.83	2.19	3.83	0.05	1.35	2.31	0.37	-0.19	5
% Total of ASEAN	0.04%	0.05%	0.07%	—	0.07%	0.16%	0.01%	—	0.29%
Indonesia	538.29	618.53	501.09	333.15	436.26	310.57	340.79	384.4	228.33
% Total of ASEAN	11.79%	14.47%	9.57%	12.21%	24.07%	22.56	13.86%	10.80%	13.68
Laos	0.01	0.01	0.01	-	0.57	10.92	0.16	-	0.2
% Total of ASEAN	—	—	—	0%	0.03%	0.79%	—	—	0.01%
Malaysia	769.48	713.82	623.78	578.65	327.25	313.71	119.47	389.41	398.82
% Total of ASEAN	16.85%	16.70%	11.91%	21.2%	18.0%	22.79%	4.85%	10.94%	23.91%
Myanmar	3.95	2.2	6.96	0.5	2.35	8.14	3.42	12.98	7.1
% Total of ASEAN	0.08%	0.05%	0.13%	0.01%	0.12%	0.59%	0.13%	0.36%	0.42%
Philippines*	89.6	71.09	17.44	-26.36	-22.43	58.94	33.12	15.18	-2.79
% Total of ASEAN	1.96%	1.66%	0.33%	—	—	4.28%	1.34%	0.42%	—
Singapore	2983.39	2394.87	3572.97	1620.05	897.05	641.87	1917.55	2421.95	1309.95
% Total of ASEAN	65.3%	56.06%	67.85%	59.4%	49.51%	46.63%	77.99%	68.47%	78.5%
Thailand*	181.44	321.95	472.13	155.69	123.75	-181.38	-66.69	278.06	108.25
% Total of ASEAN	3.97%	7.53%	9.0%	5.74%	6.83%	—	—	7.81%	6.48%
Vietnam	0.77	0.44	1.29	1.78	4.41	5.24	2.21	37.2	4.91
% Total of	0.01%	0.01%	0.024%	0.06%	0.24%	0.38%	0.08%	1.04%	0.29%

ASEAN									
Total	4564.83	4271.83	5235.73	2727.1	1811.73	1376.24	2458.42	3557.14	1667.87

* Negative values in terms of net outflows of FDI have not been imputed into the calculations.

Source: ASEAN Foreign Investment Statistics, ASEAN Secretariat, Jakarta.

These trends betray a number of challenges facing ASEAN which make problematic the prospects for deeper investment liberalization. First, the highly concentrated and unequal distribution of intra-regional investment flows highlights the dissimilar nature of ASEAN's economies and the problem of market capture. Singapore, for example, with well developed financial markets, efficient prudential capability and adept institutional and infrastructural capacity, is readily able to capture and intermeditate the lion's share of the region's investment transactions, particularly in terms of capital raising, merger and acquisitions, and allied financial, legal, and consulting support services. Similarly, Malaysia and Thailand offer infrastructural and skills capacities that have made them highly attractive production, assembly and component manufacturing platforms in the region. For the vast majority of ASEAN states, however, lower levels of economic development and poor levels of institutional and infrastructural capacity limit their ability to absorb investment flows on a scale that would significantly change current investment patterns. Investment liberalization in ASEAN thus remains as much an issue of investment absorption ability as it does an issue of engineering agreements to facilitate intra-regional investment flows. While the AIA might thus be faulted for its shortcomings and individual ASEAN states for failing to honor the letter and spirit of the agreement, clearly ASEAN faces substantial obstacles to equalizing investment absorption if only because the organization's membership continues to be composed of vastly dissimilar states whose economic composition is far from complementary.

Second, Indonesia, Thailand, the Philippines and, increasingly, Vietnam, occupy similar developmental niches in terms of low-value added manufacturing, particularly in the electronic component sector but also in terms of bio-fuels (palm oil in the case of Malaysia and Indonesia; automobile parts manufacture and assembly in the case of Thailand and Malaysia; textiles and footwear in the case of Indonesia, Vietnam and Thailand). Not only does this create competitive rather than cooperative regional dynamics, it also tends to bolster fiercely protectionist domestic political constituencies and competitive bidding wars through the provision of costly incentive systems for attracting and maintaining FDI. Competition for extra-regional FDI in ASEAN, for

example, has witnessed what the OECD recently described as a “proliferation of incentives” which national governments use as a means of driving their development and offering competitive advantages to locate in their jurisdictions.³⁵ Rather than seeing these abate or migrate to regional incentive schemes as one might expect if ASEAN was maturing toward a regional investment bloc, they in fact appear to be deepening. Indonesia, for example, reinstated its incentive structures for FDI in the mid 1990s and has intensified them year-on-year, particularly after the Asian financial crisis. So extensive have these competitive incentive structures become that the OECD now estimates the cost to ASEAN governments constitutes a significant proportion of their GDP. The estimated cost of Vietnam’s incentives, for example, now runs to 0.7% of GDP or some 5% of non-oil revenues; for the Philippines some 1% of GDP or US\$2.5 billion of forgone taxation revenues year-on-year; and as much as 1.7% of GDP for Malaysia.³⁶ Perhaps more obviously, these incentives are likely to persist as the competition not only between ASEAN states but between ASEAN states and China for extra-regional FDI continues to intensify. Since the mid-1990s, for example, the investment patterns on which ASEAN’s growth has been predicated have deteriorated. The result has been a systematic year-on-year decline in ASEAN’s share of region wide FDI: down from 50% in 1990 to between 17-19% in 2003 with China now absorbing upwards of 50% of all FDI into Asia.³⁷

Third, highly unequal intra-regional investment flows have also tended to flame nationalistic suspicions and intra-regional rivalry. As a financially dominant player in intra-ASEAN investment, Singapore, for example, is frequently perceived as predatory. Recent investments by the investment arm of the Singapore government, Temasek Holdings, into Shin Corporation, Thailand’s largest and dominant telecommunications company and majority owned by then Thai Prime Minister, Thaksin Shinawatra, for example, triggered an eventual military coup and removal of Thaksin on fears in part

³⁵ OECD (2004), International Investment Perspectives. Organisation for Economic Cooperation and Development, 2004 Edition, Paris, p.93.

³⁶ As quoted in ibid., pp.99-100.

³⁷ Darryl S.L. Jarvis (2004), The Changing Economic Environment in Southeast Asia: ASEAN, China and the Prospects for Enhanced Cooperation. Building Institutional Capacity in Asia, Ministry of Finance, Japan and the Research Institute for Asia and the Pacific, University of Sydney, Australia. p.1

reflecting the sale of telecommunications assets to foreign regional interests.³⁸ Similarly, Temasek's investment via ST Telemedia and Singapore Technologies and their purchase of a 41.9% stake in Indosat, Indonesia's satellite telecommunications company, has met with Indonesian resentment and various legal maneuverings by the Indonesian anti-monopoly watchdog who announced in November, 2007, that it would move to impose sanctions and fine Temasek.³⁹

Recent examples such as this speak to enduring problems that lessen, or at least render problematic, the prospects for engineering further agreements that deepen investment liberalization in ASEAN. The prolonged delay in the emergence of the ASEAN Comprehensive Investment Agreement (ACIA) which remains "under negotiation" despite the successful negotiation and partial ratification of the ASEAN Charter, for example, is illustrative of the depth of investment nationalism that persists in the grouping.⁴⁰ Finding meaningful ways beyond such political stumbling blocks will be no easy feat.

III Explaining Modest Success: ASEAN's Investment Regime

For an association that frequently proclaims its desire to emulate a European style of economic integration, ASEAN's achievements in the area of intra-regional investment liberalization have been modest.⁴¹ How might we explain these outcomes? ASEAN, after all, outwardly appears to have all the necessary institutional apparatus and formalized agreements necessary to propel itself forward and achieve its stated ambitions. If regionalism reflects the amalgam of state interests and negotiated settlements between

³⁸ Amy Kazmin, (2008), "Temasek to reduce stake in Shin Corp," The Financial Times, June 17.

³⁹ Bill Guerin (2007), "Telecom Tangle for Singapore's Temasek," Asia Times Online, November 22. < http://www.atimes.com/atimes/Southeast_Asia/IK22Ae01.html>

⁴⁰ At the time of writing the ASEAN Charter has been ratified by 6 of the 10 member states. The ACIA has been under negotiation for several years but, as yet, has not been formalized. At the Tenth ASEAN Investment Area (AIA) Council Meeting on August, 23, 2007, the AIA Council agreed to "complete the ACIA by the 11th AIA Council meeting in Singapore in August, 2008." Tenth ASEAN Investment Area (AIA) Council Meeting Joint Media Statement, 23 August 2007, Makati City, Philippines. ASEAN Secretariat. Jakarta. < <http://www.aseansec.org/20834.htm>>

⁴¹ See, for example, Carlos H. Conde (2007), "ASEAN Pursues EU-Style Regional Integration," International Herald Tribune, January 15.

states, then ASEAN should be well on its way to a form of supranationalism. Clearly, it is not. But why?

The ASEAN – EU comparison has always been a point of contention spurned both by ASEAN nationals as not suitable for their context while also an ambition frequently lauded as the next stage of ASEAN’s development. Explaining this contradiction perhaps involves less concentration on the state of *state-to-state* relations as it does on the sub-national contexts that empower political elites and undergirds their legitimacy. Many of ASEAN’s states, for example, remain relatively fragile in the context of their political systems and the institutional structures that support them. The Philippines, Indonesia and Thailand, have experienced recurrent periods of flux and contestation, making the state vulnerable to captive interests and powerful domestic political constituencies. Lao, Cambodia, Myanmar and Vietnam, by contrast, remain captured by specific sets of interests that reflect painful episodic events in state-making, decolonization and the emergence of independence. In the case of ASEAN, it might thus be premature to approach the notion of regionalism as a set of matured states interests that can be separated from domestic coalitions and sub-national politics.

Understanding the vexed outcomes of ASEAN’s attempts at investment liberalization might thus be better understood as a consequence of a complex and often messy amalgam of sectional interests operating at both the national *and* sub-national level which historically have impacted the efficacy of ASEAN’s attempts to construct a proactive form of regionalism. As Carroll and Sovacool note, while ‘[m]uch of the discussion over regionalism typically relates to notions of economic integration . . . [and] . . . conceives of regionalism . . . as simply the interplay between nation state actors, the result of particular organisational initiatives . . . [and] . . . the influence of particular ideas and norms,’ in Southeast Asia and the case of ASEAN, regionalism is better appreciated as a contested domain, or what they refer to as ‘contested regionalism.’⁴²

⁴² Toby Carroll and Benjamin Sovacool (2008), “Contested Regionalism in Southeast Asia: The Politics of the Trans-ASEAN Gas Line Project,” Centre for Asia and Globalization, Working Paper 002 (September), Lee Kuan Yew School of Public Policy, pp.1-2.

This approach has important implications for how we understand and explain the ebbs and flows in ASEAN's evolution and its likely future directions. For Carroll and Sovacool, for example, ASEAN states need to be broken down into their complex parts; an amalgam of state security interests typical of traditional security based conceptions of regionalism, state-capital interests that reflect the extensive role of state-based economic enterprises among ASEAN nations (PLN and Pertamina, for example, in Indonesia; Temasek Holdings and the Government Investment Corporation in Singapore; the Communications Authority of Thailand [CATs] and the Electricity Generation Authority of Thailand [EGATs]; or Petronas in Malaysia, among many other examples), as well as powerful networks of domestic capital interests, ethnic Chinese business networks reflective of the Chinese diaspora throughout southeast Asia, and ethno-political nationalisms evident in Malaysia, Indonesia, Vietnam and Myanmar.

As Carroll and Sovacool note, this 'nest of particular influences . . . both drives and shapes grand regional initiatives. . .' but in ways that both enhance and defend against regionalism or at least mold the emergence of regionalism in ways that are not exclusively defined by state-to-state interests or the primacy of a security problematic.⁴³ Thus, the initial wave of investment guarantees associated with the AAPPI can be interpreted as part of the evolution of state-based enterprises among certain ASEAN states and their move into cross-border activities, where state-based capital interests pursued the AAPPI as much to defend their interests as to promote investment among ASEAN member states. Equally, the failure to more fully realize investment liberalization represents the persistence of nascent ethno-national rivalries, who seek to champion indigenous national business. The Bumiputera ethno-nationalism evident in Malaysia, Indonesia and Brunei, for example, serves as an ardent point of reference against the successful Chinese diaspora and fears over the sublimation of these ethno-national identities in the face of Chinese business networks.

Indeed, in Southeast Asia the desire to promote Bumiputera business interests frequently produces disingenuous policy preferences, often corraling limited national resources for

⁴³ *ibid.*, p.2.

ethno-national agendas. Even in the case of capital intensive sectors, for example, where the high cost and scarcity of domestic capital should presumably set in place the parameters for investment liberalization and act as a point for convergence in ASEAN's investment coordination, there is little evidence that such developments are occurring. In the upstream energy sectors of ASEAN economies, for example, substantial year-on-year demand in electricity consumption and massive capital expenditure requirements have not translated into intra-regional liberalization or the development of collective regional energy financing mechanisms as a means of accelerating economic development through the roll out of energy infrastructure. Indonesia, for example, continues to protect small independent power producers (IPP) from external competition, lifting foreign ownership ceilings to 95% of registered capital but limiting foreign IPPs to build projects of not less than 10,000 megawatts while, at the same time, protecting PLN (Perusahaan Listrik Negara) as the monopoly off-taker of electricity.⁴⁴ In the case of small IPPs, foreign investment is essentially restricted to passive investment positions requiring local partners, with these trends essentially repeated throughout ASEAN. Ethno-national capitalisms, in other words, both drive the development agendas of many Southeast Asian states but also limit the emergence of a more robust regionalism. To the extent that ASEAN complements and helps bolster these ethno-national interests or manages the rivalries between them, its success has been guaranteed; to the extent that ASEAN has threatened such interests, its success has been modest or thwarted. The role and importance of sub-national amalgams of interests in member states is thus one important element that explains the limited regionalism that ASEAN represents.

IV. Where to Next?: The Future of Investment Liberalization in ASEAN

Despite ASEAN's lackluster achievements in intra-regional investment liberalization, individual member states have nonetheless displayed a zeal for investment liberalization principally through a spate of non-regional bilateral investment treaties (BITs). This trend further belies the ethno-national rivalries in the region and the preference for engaging in

⁴⁴ Interview PLN, Jakarta, April 8, 2009. Only one foreign IPP build project of 10,000 Megawatts is currently underway and operated by a Chinese consortium, the first large foreign IPP in Indonesia in over 10 years.

non-regional bilateral initiatives as a means of securing competitive advantages for networks of domestic capital. In Thailand, for example, Thaksin’s policy of turning state owned enterprise (SOE) into ‘national champions’ much as Malaysia, Indonesia and Singapore have, has seen Thailand and other ASEAN states more readily embrace BITs as an aggressive form of domestic capital sponsorship. Such preferences have dominated ASEAN member states approaches to investment liberalization, in the process circumscribing ASEAN’s role as an investment bloc.⁴⁵ As Table 5 highlights, all ASEAN states with the exception of Myanmar and Brunei have aggressively pursued bilateral investment agreements, with ASEAN’s membership collectively signing 326 BITs as of 2007. As Table 5 also demonstrates, however, the pattern of BIT agreements lie beyond the region. Excluding Myanmar which remains blacklisted among most Western states, and Cambodia and Laos where limited investment opportunities have constrained the engagement of extra-regional parties, the vast majority of BITs entered into by ASEAN’s members (some 85% or 278 BITs) have been with *non*-ASEAN states.

Table: 5: ASEAN Member State BITS

Country	Total Number of BITS signed by ASEAN states	Number of BITS signed with an ASEAN member	Percentage of Total Number of BITS signed with an ASEAN member state
Brunei	5	0	0%
Cambodia	16	6	38%
Indonesia	60	7	12%
Laos	21	6	29%
Malaysia	66	4	6%
Myanmar	4	3	75%
Philippines	35	5	14%
Singapore	31	4	13%
Thailand	39	5	13%
Vietnam	49	8	16%

Source: UNCTAD World Investment Report: Transnational Corporations, Extractive Industries and Development. United Nations Conference on Trade and Development (UNCTAD), New York & Geneva, 2007. See also WorldTradeLaw.net <http://www.worldtradelaw.net/fta/ftadatabase/ftas.asp>

⁴⁵ See, for example, Greacen, Chuenchom Sangarasri and Chris Greacen (2004), “Thailand’s Electricity Reforms: Privatization of Benefits and Socialization of Costs and Risks,” *Pacific Affairs*, 77(3), Fall, pp.527.

This trend is prescient of the likely direction of investment liberalization in Southeast Asia in the future; one potentially dominated by a “spaghetti bowl” effect of overlapping BITs and BTA (bilateral trade agreements) that will collectively define the region’s investment architecture. The implications of this are varied but all of them potentially significant for ASEAN. For example, with the failure of WTO talks in 2006 to realize further liberalization in the global trade and investment system, states have been forced to place greater emphasis on bilateral initiatives as their principal tool for enhancing trade and investment facilitation. By their very nature, bilaterally negotiated agreements have proven to be relatively efficient, simple and effective instruments for achieving stated economic goals and, judging by their number, are now favored instruments. The problem for ASEAN, of course, is that they effectively usurp or bypass regionally orchestrated agreements such as the AIA and pose the risk of marginalizing ASEAN as the region’s most proactive and central instrument for securing inter-state economic cooperation and mutual welfare gains. To put it another way, BITs because they are targeted and nested in mutually defined interests, appear to produce deeper liberalization measures and superior welfare effects than has been the case with the AIA; this, after all would explain why some ASEAN states have pursued BITs with other ASEAN states even in the presence of the AIA agreement.

Further, the pursuit of BITs by ASEAN states might also be assessed in terms of the superior dispute resolution procedures they typically contain. Most BITs have recourse to independent arbitration in third party countries in the case of investment disputes and or breach of investment guarantees. This is not the case with the AIA which, under both the 1998 and 2001 agreements relied on political-cum-bureaucratic dispute resolution mechanisms contained first in the Protocol on Dispute Settlement Mechanism (1996) and second in the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (APEDSM)(2004).⁴⁶ Both agreements are not geared to investment disputes *per se* and speak more to state-state rather than firm-state dispute settlement procedures. Regardless,

⁴⁶ Protocol on Dispute Settlement Mechanism, Manila, November 20, 1996. ASEAN Secretariat, Jakarta. <<http://www.aseansec.org/16654.htm>>. ASEAN Protocol on Enhanced Dispute Settlement Mechanism, Vientiane, Lao, PDR, November 29, 2004. ASEAN Secretariat, Jakarta. <<http://www.aseansec.org/16754.htm>>

as a medium for dispute resolution the veracity of the APEDSM still reverts to political processes. As Walter Woon, the Attorney General of Singapore notes:

The heart of the Vientiane Protocol . . . provides for the establishment of a panel to look into the dispute and make findings to assist the Senior Economic Officials Meeting (SEOM) to come to a discussion. SOEM, on its part, shall adopt the panel's report, unless it decides by consensus not to, or if one of the parties signals its intention to appeal. . . ⁴⁷

The APEDSM, in other words, is not strictly a legal based instrument but reverts to economic officials and political organs that can disregard the recommendations of the appointed adjudication panel. All this points to shortcomings in the AIA which likely explain the prevalence and deepening web of BITs entered into by ASEAN's member states. It also points to a further irony in the liberalization process in ASEAN; that much if not most is being driven by instruments and mechanisms external to the association rather than the various agreements constructed by the association. BITs and BTAs, for example, point to much deeper levels of penetration into protectionist practices than those achieved by the AIA or the AAPPI. In the case of tariff liberalization, for example, one commentator went so far to note that:

In practice AFTA [the ASEAN Free Trade Agreement] and its core agreements (on tariff, investment and services) have so far merely given the appearance of political cooperation on economic liberalization policy changes that were happening anyway. Also, because of the depth of unilateral liberalization in ASEAN countries, there do not appear to have been any significant tariff or investor benefits for being an ASEAN member as opposed to a non-ASEAN member.⁴⁸

⁴⁷ Walter Woon (2008), "The ASEAN Charter Dispute Settlement Mechanism," <www.agc.gov.my/agc/agc/rev/agcjc/3rd/pdf/Singapore-The_ASEAN_Charter_Dispute_Settlement_Mechanisms.pdf>

⁴⁸ As quoted in Carol Pagaduan-Araullo (2007), "ASEAN Hype," *Bulatat* (Manila), 7(26), August 5-11, as posted Bilaterals.org

Paradoxically, then, many of the standards associated with liberalization highlighted at the outset of this paper, particularly national discretionary autonomy in relation to investment screening and conditionality provisions, transparency in respect of national investment regimes and codification of regulatory standards governing investment related provisions, are being moderated more so by the outcomes of bilateral initiatives than by ASEAN based ones. The danger, of course, is that since the majority of these bilateral agreements reside with countries external to the region, the investment provisions and patterns they create will skew relationships in ways that do not necessarily complement regional ideals or the longer terms goals of ASEAN economic integration.

ASEAN, in a sense, is thus being outclassed, outmaneuvered and is in danger of becoming outdated if renewed commitment to investment liberalization is not forthcoming. Making ASEAN relevant to investment liberalization and to enhancing investment volumes across its membership base will require considerably more effort than has thus far been displayed. Much, of course, will depend on the outcomes of the long awaited ASEAN Comprehensive Investment Agreement (ACIA) which is set to supersede the AIA when formalized in August 2008. It might, however, be premature and overly optimistic to assume that the ACIA will prove the panacea to reinvigorating investment liberalization in ASEAN. As Walter Lohman and Anthony B. Kim note:

ASEAN's ambition is clear, its record in implementing agreements to facilitate economic integration is spotty, and its commitment to economic freedom is subpar. ASEAN requires a resolution of vision to get to ASEAN Economic Community by 2015. It also needs tools and resources to manage the undertaking effectively.⁴⁹

<http://www.bilaterals.org/article.php?id_article=9251&var_recherche=ASEAN+investment+liberalization>

⁴⁹ Walter Lohman and Anthony B. Kim (2008), "Enabling ASEAN's Economic Vision," Background, No.2101. The Heritage Foundation, Washington D.C., p.12.

Historically, ASEAN has been long on talk and short on concrete deliverables. Singapore's former Foreign Minister, Professor S. Jayakumar, for example, noted that ASEAN has at times been widely perceived to be "ineffective" and at various junctures in danger of being marginalized by its dialogue partners and international investors alike.⁵⁰ Transforming ASEAN beyond what Hadi Soesastro described as a "diplomatic community" into a true economic community is, of course, the intent behind recent political initiatives and the newly minted ASEAN Charter.⁵¹ The ambitions are again clear and concisely articulated. Whether, however, these ambitions materialize remains the preserve of individual member states and of their commitment to enhancing the supranational capabilities of ASEAN. With a secretariat that is only 210 people strong, resource capabilities well beneath those required to service a community of some 600 million people, and an ambitious agenda for economic integration, it is obvious that considerably more effort, resources and political commitment will be required in the coming years.

⁵⁰ Professor S. Jayakumar as quoted in Simon S.C. Tay, Jesus P Estanislao & Hadi Soesastro (2001), Reinventing ASEAN, Institute of Southeast Asian Studies, Singapore, p.ix.

⁵¹ Hadi Soesastro (2001), "ASEAN in 2030: The Long View," in Simon S.C. Tay, Jesus P Estanislao & Hadi Soesastro (2001), Reinventing ASEAN, Institute of Southeast Asian Studies, Singapore, p.308.

Appendix I: ASEAN Foreign Direct Investment Temporary Exclusion List and Sensitive List, 2008: Manufacturing, Agriculture, Fishery, Forestry, Mining and Quarrying Sectors

Country	Temporary Exclusion List / Restricted Investment Sector / Industry	Restriction / Conditionality Requirements	Sensitive List Sector / Industry	Restriction / Conditionality Requirements
Brunei Darussalam [^]	<p>Growing of cereals and other crops</p> <p>Growing of vegetables, horticultures specialties, nursery products, Fruits, nuts, beverage and spice crops</p>	<p>30% local participation requirement for eligibility to access government facilities and sales to domestic market</p>	<p>Arms and Ammunition</p> <p>Spirit and other alcoholic beverages</p> <p>Fireworks</p> <p>Tobacco and tobacco substitute products</p> <p>Polluting industries affecting the environment</p> <p>Retail</p> <p>Other manufacturing industries according to previously published list</p>	<p>Prohibited</p>
Indonesia ⁺	<p>Sawn Timber</p> <p>Veneer woods industry</p> <p>Plywood Industry</p> <p>Laminated Veneer lumber</p> <p>Wood chip industry</p> <p>Security printing / security paper printing / Security ink</p>	<p>Special permissions required and or approvals and subject discretionary conditionality clauses</p> <p>Materials sourcing stipulations / requirements</p> <p>Permit approvals / ministerial authority and approvals</p>	<p>Food & Beverage (F & B) industries involving food preparation of shredded, boiled, fried or jerked meat; salted / pickled fish & other marine biota</p> <p>F & B industries involving food preparation of chips produced from flour flavored with shrimp / fish; fish / shrimp condiment</p> <p>F & B industries preparing /</p>	<p>Prohibited investment (reserved for small scale enterprise)</p> <p>Prohibited investment (reserved for small scale enterprise)</p> <p>Prohibited</p> <p>Prohibited investment (reserved for small scale enterprise)</p>

	<p>Pulp industry</p> <p>Clove, cigarette and other cigarette industries</p> <p>Port facilities (connecting port)</p> <p>Agricultural business greater than 25 Hectares</p> <p>Domestic / international Sea transportation / port loading facilities / port infrastructure services — jetty, container terminal, liquid bulk terminal, dry bulk terminal / port waste reception facilities</p>	<p>Clearance / recommendation from relevant ministries / cooperation / sourcing requirements with small enterprise</p> <p>JV or BCC with domestic partner as stipulated by government</p> <p>Maximum equity ownership of 95%</p> <p>Max equity restrictions of 49%</p>	<p>processing grains, cereals, legumes & tubers, including rice flours of various kinds; four made of legumes; flour made of dried cassava</p> <p>F & B industries making bread, cookies and the like</p> <p>Postal services</p> <p>Non-Ferrous Metal Industry (Lead)</p> <p>Cyclamate and Saccharin Industry</p> <p>Chlor Alkali Industry with Mercury Contained Materials</p> <p>Alcoholic Beverage Industry (Liquor, Wine, and Malt Beverage)</p> <p>Chemical Industry Environmental Damageability, such as: Penta Chlorophenol, Dichloro Diphenyl Trichloro Ethane (DDT), Dieldrin, Chlordane, Carbon Tetra Chloride, Chloro Fluoro Carbon (CFC), Methyl Bromide, Methyl Chloroform, Halon, and the like</p> <p>Air Traffic Service (ATS) Provider</p> <p>Telecommunication/ Marine Aids to Navigation</p> <p>Provider and Operator of Terminal</p> <p>Public Broadcasting Service (LPP) of Radio and Television</p> <p>Management and Operation of Station</p>	<p>Prohibited</p> <p>Prohibited</p>
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			Monitoring Spectrum Radio Frequency and Satellite Orbit equipment / infrastructure	
			Sawmill and plywood operation and manufacture	
Malaysia			Pineapple canning	Prohibited except for projects with source of supply drawn from own plantations
			Palm oil milling	Prohibited except for projects with source of supply drawn from own plantations
			Palm oil refining	Prohibited in Peninsular Malaysia; permitted in Sabah & Sarawak with source supply from own plantations
			Sugar refining	Prohibited
			Liquors and alcoholic beverages	Prohibited
			Tobacco processing and cigarettes	Prohibited
			Sawn timber, veneer & plywood	Prohibited for Peninsular Malaysia & Sabah; permitted in Sarawak
			Wood based products utilizing local logs as raw materials	Prohibited for Peninsular Malaysia' Permitted in Sabah & Sarawak
Philippines			Manufacturing Cooperatives	No (nill) foreign equity permitted
			Agriculture, fishery, mining and quarrying cooperatives	No (nill) foreign equity permitted
			Peoples small scale mining program (mining activities which rely extensively on manual labor using simple implements / methods, not	Only Philippine citizens or corporations with minimum of 60% capital owned by Philippine citizens who voluntarily form a cooperative

			exceeding 20 hectares with investment not exceeding P10.00 million)	licensed by Department of Environment and Natural resources may engage in the extraction / removal of minerals or ore bearing materials
Thailand [^]	Artificially propagated or plant breeding Fishery and marine animal culture Logging from plantation	Foreign equity participation restricted to less than 50% of registered capital Foreign capital participation of 50% or more of registered capital permitted subject to i.) Permission of Director General of Business Development & approval of Foreign Business Committee; ii.) Permission under law governing Industrial Estate Authority of Thailand or other related laws		
Singapore			Chewing gum/ bubble gum / dental chewing gum or any like substance Firecrackers / matchsticks Pig farming Quarrying Publishing and printing of newspapers	Prohibited on the basis of safety & social reasons Prohibited on the basis of safety & social reasons No more licenses issued No more licenses issued Foreign equity subject to approval of relevant Ministry
Cambodia			Poisonous chemicals Agricultural pesticides / insecticides Any other goods / manufactured item using chemical substances that effect public health & the environment	Disallowed Disallowed Disallowed

			Psychotropic & narcotic substances	Disallowed
			Electricity production using imported waste products	Disallowed
			Forestry exploitation / harvesting	Disallowed
Lao PDR	<p>Manufacture of beverages including soft drinks, ethyl alcohol and spirits, drinking and mineral water, fruit juices</p> <p>Manufacture of cigarettes</p> <p>Leather tannery and leather dressing</p> <p>Manufacture of wood products, including plywood, laminboard, particle board and other wood panels and boards</p> <p>Sawmilling and planning of wood</p> <p>Manufacture of pulp paper, paper and paper-board</p> <p>Manufacture of soap, detergents, cleaning and polishing preparations, perfumes and toilet preparations</p> <p>Manufacture of PVC pipes, plastic products, electrical accessories, rubber tong shoes, electric wires</p> <p>Manufacture of steel rods, casting of iron & steel</p> <p>Manufacture of agricultural tools, machinery and equipment</p>	<p>Various conditionality clauses imposed at the discretion of Lao PDR authorities. Conditionality clauses are “negotiated with the Lao Authorities concerned” and are discretionary*</p>	<p>Manufacture of Lao dolls</p> <p>Manufacture of products of copper, silver, & gold (jewelry)</p> <p>Manufacture of Lao musical instruments</p> <p>Manufacture of blankets / mattresses with cotton & kapok</p> <p>Manufacture of beer</p> <p>Manufacture of rice noodles</p>	<p>Prohibited (reserved for Loa national)</p> <p>Prohibited (reserved for Loa national)</p> <p>Prohibited (reserved for Loa national)</p> <p>Prohibited (reserved for Loa national)</p> <p>Subject to joint venture with domestic investors and / or export of 100%</p> <p>Subject to high ratio of local content (use of local raw material) and/or export</p>

	Manufacture of furniture			
Myanmar[^]	<p>Manufacture of refined petroleum products</p> <p>Extraction of hardwood and sale of hardwood</p> <p>Exploration, extraction and sale of petroleum</p> <p>Fishing of marine fish, prawns and other aquatic organisms</p> <p>Manufacture of veneer sheets, plywood, lamin-board, particle board and other panels and boards.</p> <p>Air transport service and rail transport service</p> <p>Production and marketing of basic construction materials, furniture, parquet, using teak extracted and sold by state-owned economic organization</p> <p>Ownership of land</p>	<p>Prohibited (reserved for state sector)</p> <p>Prohibited & subject to national policy on forestry</p> <p>Prohibited except as where prescribed by notification of the government</p> <p>Prohibited except as where prescribed by notification of the government</p> <p>Prohibited & subject to national policy on forestry</p> <p>Prohibited</p> <p>Prohibited</p> <p>Prohibited</p>	<p>Electricity generating services other than those permitted by law to private and cooperative electricity generating services</p> <p>Saw milling</p> <p>Aquaculture (fish & prawn) breeding</p> <p>Forestry and forest plantations</p> <p>Manufacture of pulp of all kinds</p> <p>Exploration / extraction / export / sale of jade, precious stones</p> <p>Distilling, blending, rectifying, bottling and marketing of all kinds of spirits, beverages and non-beverages</p> <p>Manufacture of malt, liquors, beer and other brewery products, soft beverages, aerated and non-aerated products, drinking water.</p> <p>Manufacture of cigarettes</p> <p>Manufacture of corrugated galvanized iron sheets and sale</p> <p>Provision / investment of telecommunications service, broadcasting or television services of any kind</p> <p>Banking and</p>	<p>Prohibited</p> <p>Reserved for government</p> <p>Reserved for government and village cooperatives</p> <p>Prohibited</p> <p>Prohibited</p> <p>Prohibited</p> <p>Prohibited</p> <p>Prohibited</p> <p>Prohibited</p> <p>Prohibited</p> <p>Prohibited</p>

			insurance services	
Vietnam	Processing of aqua-products & canned sea foods	Subject to joint-venture, stipulated materials and technology requirements. Output must be 80% for export market	Exploration / processing of oil, gas, precious & rare minerals	Restricted to Joint Venture or BCC (Business Cooperation Contracts) or as stipulated by government
	Vegetable oil production and processing	Subject to association and development of local raw materials, resources and subject to export requirement	Air, railway, seas transportation, public passenger, airport and port infrastructure	
	Dairy processing	Subject to association and development of local raw materials, resources and subject to export requirement	Press, radio and television activities	
			Provision of public telecommunication networks, telecommunication services, domestic or international courier services	
			Construction & operation of international telecommunication networks	
			Production of cement, steel, Iron	
			Industrial explosives	
			Aforestation and planting of perennial industrial crops	
			Construction & operation of industrial facilities of industrial zones, export processing zones and high-tech zones	
			Manufacture of —	Minimum of 80% must be for export market
			2 wheeled motorized bicycles	
			tourism cars and trucks of less than 10 tons	
			irrigation water pumps	
			medium & low voltahe electric	

			<p>cables</p> <p>common use telecommunication cables</p> <p>sea transportation vessels of less than 30,000 tones</p> <p>audio-video products</p> <p>Pr shaped aluminum products</p> <p>Common steel for building</p> <p>Facing tiles and sanitary ceramics</p> <p>NPK fertilizer</p> <p>Detergents</p> <p>Common use paints and building paints</p> <p>Lead and acid batteries</p> <p>PVC plastics</p> <p>Tyres for bicycles and motorbikes</p> <p>Soda and Acid</p> <p>Electric fans of all kinds</p> <p>Bicycles and spare parts</p> <p>Electrical transformers of less than 35 kV</p> <p>Diesel engines of less than 15cc</p> <p>Garments</p> <p>Footwear</p> <p>Common use plastic products</p>	
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^ Brunei Darssalam, Thailand and Myanmar do not publish a “sensitive list” as such but include on their Temporary Exclusion List restrictions and or conditionality clauses. These are not indicated for phase out but only for “periodic review.”

+ Presidential Regulation of the Republic of Indonesia, Number 77 of 2007, Concerning the list of lines of Business Closed and Open with Conditions of Investment.

* Source. “List of manufacturing industries to be promoted for foreign investment into Lao PDR,” ASEAN Secretariat, www.aseansec.org/6504.htm

Source: ASEAN Secretariat, Jakarta, Indonesia.

Appendix II: ASEAN Foreign Direct Investment Temporary Exclusion List and Sensitive List, 2008: Industries for Services Incidental to the Manufacturing, Agriculture, Fishery, Forestry, Mining and Quarrying Sectors

Country	Temporary Exclusion List / Restricted Investment Sector / Industry	Restriction / Conditionality Requirements	Sensitive List Sector / Industry	Restriction / Conditionality Requirements
Brunei Darussalam[^]	<p>Agricultural and animal husbandry service activities on a fee or contract basis</p> <p>Services rendered on a fee or contract basis for the following areas:</p> <ul style="list-style-type: none"> • Renting of agricultural machinery / equipment • Veterinary services • Agricultural research / experimental development • Agricultural market research <p>Forest plantations & nurseries</p> <p>Forest based industry processing</p>	Foreign equity participation restricted to a maximum of 70% to be eligible to access government facilities and sales to domestic market		
Indonesia+	<p>Livestock market on a fee or contract basis</p> <p>Manufacture of food & beverages on a fee or contract basis, including i.) fruits / vegetables canning; ii.) fruits and</p>	Prohibited on the basis of National Security	<p>Health service facilities</p> <p>Private maternity facilities</p> <p>Pharmacy services / public drugstore</p> <p>Pharmaceutical</p>	100% domestic capital requirement

	<p>vegetables pulverizing, juicing and pasting industry; iii.) ice cream industry; iv.) cassava starch industry</p> <p>Agricultural cool rooms</p> <p>Agriculture: packaging</p> <p>Agricultural: where-housing</p> <p>Scheduled Domestic / international public transport services /</p> <p>Specialized air transport services (medical, crew training, air transport sales agency)</p> <p>General cargo transport services</p> <p>Hazardous materials transport services</p> <p>Container transport services</p> <p>Educational services (basic and middle education, high education)</p> <p>Architectural services</p> <p>Engineering and design services</p> <p>Construction services</p> <p>Insurance (life, general, reinsurance, broker)</p>	<p>Restricted to localities near wholesale market</p> <p>Restricted to exported fresh horticulture</p> <p>Restricted to localities associated with wholesale market</p> <p>Maximum foreign equity participation of 49%</p> <p>Maximum foreign equity participation of 55%</p> <p>Maximum foreign equity participation of 80%</p>	<p>Wholesales / Pharmaceutical raw material wholesales</p> <p>Pension funds</p> <p>Private broadcasting service / subscribed broadcasting service / Press company</p> <p>Retailing through the media</p> <p>Film distribution (import / export and domestic distribution)</p> <p>Technical film, / production services / facilities / processing</p> <p>Pitt sand mining</p> <p>General medical services / hospital / general clinic</p>	
Malaysia			Services incidental to manufacturing activities undertaken on a fee / contract basis associated with	As stipulated on the general sensitive list (see Appendix I)

			<p>pineapple canning, palm oil milling, palm oil refining, sugar refining, liquors and alcoholic beverages, tobacco processing and cigarettes, sawn timber, veneer & plywood production, wood based products utilizing local logs as raw materials (as specified on the sensitive list and the conditions stipulated therein). See Appendix I</p> <p>Timber extraction and harvesting services</p> <p>Specialized consultancy, advisory & operation services in agriculture, animal husbandry, fishery industry</p> <p>Services incidentals to oil & gas extraction</p>	<p>Closed to foreign investment in Peninsular Malaysia & Sabah. 30% maximum foreign equity participation for Sarawak and or subject to case by case determination</p> <p>Restricted to maximum of 30% foreign equity participation and or considered on a case by case basis</p>
Philippines			<p>Services incidental to the utilization of marine resources in archipelagic waters, territorial sea and exclusive economic zone (i.e., taking of marine or freshwater crustaceans, mollusks, aquatic animals, marine materials, operation of fish hatcheries, cultivation of edible seaweeds, fish farming, breeding, rearing, cultivation of oyster for pearls or food).</p> <p>Services related to</p>	<p>Prohibited</p> <p>Prohibited</p>

			small scale mining operations and related services (incidental to quarrying stone, sand, clay, mining of chemical and fertilizer minerals, extraction of salt)	
Thailand			Services incidental to the newspaper business Services incidental to rice farming, farming or gardening & services related to animal farming Services related to fishery for marine animals	Foreign equity participation restricted to less than 50% of registered capital
Singapore			Services incidental to the manufacture of chewing gum, bubble gum, dental chewing gum or any like substance Services incidental the manufacture of firecrackers and matchsticks Services incidental to quarrying Services related to pig farming	Prohibited on grounds of safety and social reasons No more licenses issued.
Cambodia	Not available			
Lao PDR			Services incidental to the manufacture of weapons / ammunitions Services incidental to the manufacture of narcotic drugs Services incidental to the manufacture of cultural items / destructive of the national culture and tradition Services incidental to	Prohibited due to national security, natural environment, public health and / or national culture

			the manufacture of chemical substances and industrial waste hazardous to human life & the environment.	
Myanmar^	<p>Services related to manufacture of Pharmaceuticals</p> <p>Services for manufacturing of barites powers from indigenous ores</p> <p>Services relating to manufacture of refined petroleum products</p>	<p>Subject to permission from Food & Drug Administration</p> <p>Prohibited and confined to State-Owned corporation</p> <p>Prohibited unless notified by the government & subject to State-Owned Economic Enterprises Law</p>		
Vietnam^	<p>Advertising services</p> <p>Services related to the production of electronic scales for postal operation</p> <p>Services related to the production of small capacity microwave equipment, main distribution frame component, subscriber local loop equipment, terminal boxes, wiring cables (telephony)</p> <p>Services related to producing small capacity telephone switching systems, optical fiber terminals, telephone sets</p> <p>Services related to maintaining and repairing electrical and mechanical</p>	<p>Foreign investment permitted only in the form of a Joint-Venture or BCC (Business Cooperation Contract)</p> <p>Subject to export, technology and export requirements</p> <p>Prohibited. No investment licensed will be issued.</p>		

	equipment used in the steel industry			
	Maritime and aviation business services	Subject to BCC / JV or as stipulated by government		

^ Brunei Darssalam, Thailand and Myanmar do not publish a “sensitive list” as such but include on their Temporary Exclusion List restrictions and or conditionality clauses. These are not indicated for phase out but only for “periodic review.”

+ Presidential Regulation of the Republic of Indonesia, Number 77 of 2007, Concerning the list of lines of Business Closed and Open with Conditions of Investment.

Source: ASEAN Secretariat, Jakarta, Indonesia.

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