Australian Journal of International Affairs

Publication details, including instructions for authors and subscription information:
http://www.tandfonline.com/loi/caji20

Foreign direct investment and investment liberalisation in Asia: assessing ASEAN's initiatives

Darryl Stuart Jarvis

Available online: 15 Mar 2012

To cite this article: Darryl Stuart Jarvis (2012): Foreign direct investment and investment liberalisation in Asia: assessing ASEAN's initiatives, Australian Journal of International Affairs, 66:2, 223-264

To link to this article: http://dx.doi.org/10.1080/10357718.2012.642297

Australian Journal of International Affairs Vol. 66, No. 2, pp. 223–264, April 2012

Routledge
Taylor & Francis Group

Foreign direct investment and investment liberalisation in Asia: assessing ASEAN's initiatives

Darryl Stuart Jarvis*

This article explores the cooperative endeavours of the Association of Southeast Asian Nations (ASEAN) in the area of investment liberalisation. Investment liberalisation is variously associated with net positive effects on inflows of investment capital, technology transfer, employment, export generation, economic growth and development. As a net historical beneficiary of investment flows, the article hypothesises that ASEAN's stated commitment to investment liberalisation should by now be realising progress in each of four areas: (1) absolute reductions in national autonomy in relation to investment screening and conditionality provisions; (2) increased transparency in respect of member states' national investment regimes; (3) enhanced standardisation and codification of regulatory standards governing investment-related provisions across member states; and (4) enhanced centralised coordination and decision-making in respect of investment governance. Each of these areas is investigated in relation to ASEAN's three primary investment agreements and the ensuing regimes that govern investment provisions and policy practices among member states.

Keywords: ASEAN; investment; liberalisation

Introduction

In 2007, the Association of Southeast Asian Nations (ASEAN) celebrated its fortieth birthday. The original founding members—Indonesia, Malaysia, the Philippines, Singapore and Thailand—have subsequently been joined by Brunei Darussalam (1984), Vietnam (1995), Lao People's Democratic Republic (PDR), Myanmar (Burma) (July 1997), and Cambodia (April 1999). From a small five-state security community, ASEAN now comprises an association with a combined population of 600 million and a gross domestic product (GDP) of

*Darryl Stuart Jarvis is Vice Dean (Academic Affairs) and an Associate Professor in the Lee Kuan Yew School of Public Policy at the National University of Singapore. His research focuses on the political economy of investment, regulation and risk in Asia. His most recent publications include *ASEAN Industries and the Challenge from China*, with Anthony Welch (Palgrave Macmillan, 2011) and *Infrastructure Regulation: What Works, Why, and How Do We Know? Lessons from Asia and Beyond*, with Ed Araral, M. Ramesh and Wu Xun (World Scientific, 2011). He is currently the recipient of a large multi-year research grant to examine regulatory risk in the infrastructure sector in Asia. <Darryl.Jarvis@nus.edu.sg>

ISSN 1035-7718 print/ISSN 1465-332X online/12/020223-42
http://dx.doi.org/10.1080/10357718.2012.642297

US$1 trillion, and generates annual trade flows in excess of US$900 million. 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 realising economic integration via the 'free flow of goods, services, investment, and a freer flow of capital', evidence of deeper economic engagement remains problematic.[1]

This article explores ASEAN's cooperative endeavours in one such area: investment liberalisation. Investment liberalisation is variously associated with net positive effects on inflows of investment capital, technology transfer, employment, export generation, economic growth and development (see UNCTAD 2003: 87–8; see also Quazi 2007). As a net historical beneficiary of investment flows, the article hypothesises that ASEAN's stated commitment to investment liberalisation should by now be realising progress in each of four areas: (1) absolute reductions in national autonomy in relation to investment screening and conditionality provisions; (2) increased transparency in respect of member states' national investment regimes; (3) enhanced standardisation and codification of regulatory standards governing investment-related provisions across member states; and (4) enhanced centralised coordination and decision-making in respect of investment governance. Each of these areas is investigated 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 lifeblood 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 (Sakakibara and Yamakawa 2003: 18–9). 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, and promote export activity and employment generation. Recognising 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, which together define the policy architecture of ASEAN's investment regime: the ASEAN Agreement for the Promotion and Protection of Investments (AAPPI; 1987, 1996) and 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

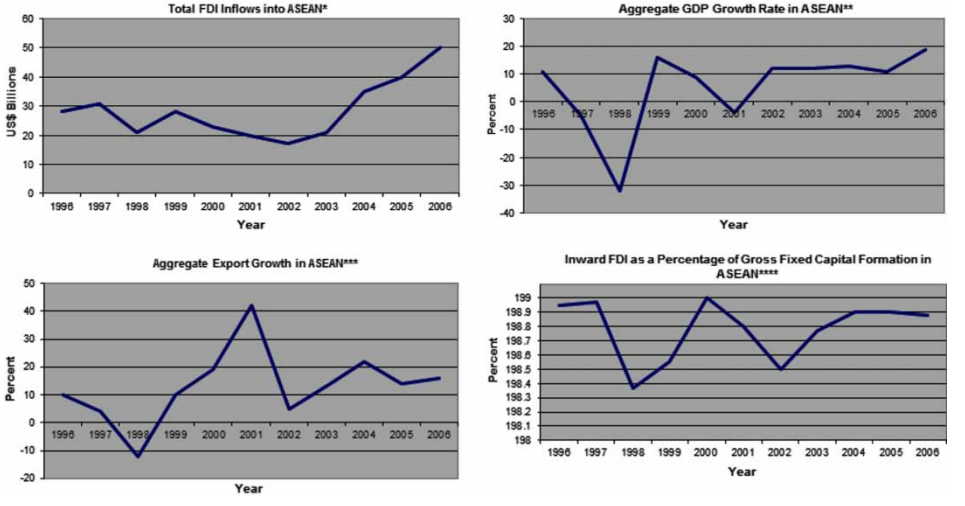

Figure 1. FDI inflows, growth, exports and fixed capital formation, 1996–2006.
Notes: These are the author's calculations using the World Bank's World Development Indicators.
*Data for Brunei Darussalam was not available. The figures are in current US$ and rounded off to the nearest billion.
**Data for Myanmar was not available. The figures are in current US$ term and rounded off to the nearest percentage point.
***Data for Singapore from 1995 to 2000 and for Myanmar was not available. The figures are in current US$ term and rounded off to the nearest percentage point.
****Data for Lao PDR from 1995 to 1999 and for Myanmar was not available. The figures are in current US$ term and rounded off to the nearest one-hundredth of a percentage point.

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 complementarities (ASEAN Secretariat 1987b: Point 29). Much of the weight of ASEAN's success and/or failure thus rests on the efficacy of these agreements and the outcomes they realise.

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 (ASEAN Secretariat 1987a) represents the culmination of a decade-long series of negotiations and ASEAN's first multilateral endeavour at enhancing investment cooperation. Its importance lies not just in the architecture it sets 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.[2] The AAPPI thus casts a long shadow over ASEAN's investment regime and the ensuing character of the association's liberalisation 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: (1) stipulation of investor treatment; (2) investor protections and compensation; and (3) 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 (ASEAN Secretariat 1987a: Article IV), and stipulating that this cannot be less than that granted to investors accorded MFN (most favoured nation) status. 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 these 'shall not impair by unjustified or discriminatory measures the management, maintenance, use, enjoyment, extension, disposition or liquidation of such investments' (Article IV.1). Judicial, political or legislative measures that unfairly discriminate 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 (Article IV.3). The clause, however, does not guarantee compensation or restitution, and is not intended as an instrument of investor indemnity against civil unrest or political risk.

The second of the provisions in the agreement address investor protections. Two sets of protections are identified: the repatriation of capital, 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 with 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 (Article VI.1).

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 centres.[3] While the agreement makes the

disputation 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

As Tables 1 and 2 indicate, the AAPPI has fallen short of its original intent to propel the expansion of intra-ASEAN investment 'to at least ten per cent of total foreign investments by the turn of the century', with the level of intra-regional investment remaining stubbornly static—not only in dollar terms, but also as a percentage of total capital flows to the region (ASEAN Secretariat 1987b: Point 29). As late as 2005, for example, intra-ASEAN investment accounted for less than 10 percent of total FDI inflows.

While there are countless factors that impact investment flows, making it hard to apportion causality 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 the 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.[4]

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 to 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 or to impose registration and annual renewal requirements on foreign investment. So, too, the AAPPI does not limit the conditionality rights of member states, allowing

Table 1. FDI inflows into ASEAN by source country/region, 1995–2005 (US$ millions).

Source country/ region	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
ASEAN*	3516.9	3121.7	3962.9	2073.1	934.6	714.3	933.0	3634.0	2302.0	2433.0	3765.1
European Union (EU)**	5067.1	6231.2	5542.9	5344.3	7051.1	2609.3	4141.7	4236.0	52,320.0	5421.0	11,139.6
USA	2119.0	4586.5	6669.4	3427.3	4992.3	2404.6	3150.0	358.0	1395.0	5052.0	3010.6
Total in flows	23,389.4	25,544.4	29,612.3	21,778.6	22,169.7	8513.6	10,293.3	13,705.0	18,447.0	21,804.0	41,067.8
ASEAN intra-FDI inflows as a percentage 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

Notes: *Excludes Cambodia 1995–2004; includes Cambodia 2005.
**EU-15 1995–2004; EU-25 2005.
Source: ASEAN Secretariat (2003b, 2006, 2009a).

Table 2. ASEAN FDI net inflow from selected partner countries/regions, 2002–6.

	Value (US$ millions)				Share of total net inflow (percent)			
Partner country/region	2004	2005	2006	2002–6	2004	2005	2006	2002–6
ASEAN	2803.7	3765.1	6242.1	19,377.7	8.0	9.2	11.9	11.3
USA	5232.4	3010.6	3864.9	13,736.1	14.9	7.3	7.4	8.0
Japan	5732.1	7234.8	10,803.3	30,813.7	16.3	17.6	20.6	18.0
European Union (EU)-25*	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	2302.9	2.1	1.2	1.8	1.3
Republic of Korea	806.4	577.7	1099.1	3347.3	2.3	1.4	2.1	2.0
Australia	566.7	195.9	399.2	1444.3	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	1184.9	0.9	0.4	0.5	0.7
Russia**	–	–	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***	8770.1	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 at time of publication
n.a. not applicable
0.0 < 0.1 percent
*Includes Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.
**No separate data available; included in 'Others'.
***Includes inflow from all other countries, including Russia, as well as total reinvested earnings in the Philippines (local banks only) for 2002–6.
Source: ASEAN FDI Database (compiled from data submission of central banks, national statistical offices and other relevant government agencies).

them to impose point-of-entry and operating conditions on investments or to 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 limit the scope of equivalency treatment. Article IV.4 (ASEAN Secretariat 1987a), for example, notes that 'any two or more of the contracting parties *may negotiate* 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' (my emphasis). 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 (Thanadsillapakul 2001). This provides signatory states with the latitude to specify modes of treatment or impose limitations 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 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 to 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 do 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 have ultimate juridical authority over 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 (Greenwalk 2006: 202–9).

Finally, the AAPPI leaves untouched issues associated with the transparency of the investment regime or the standardisation and formal codification of the regulatory regime responsible for oversight and governance of investment. Under the auspices of the AAPPI, for example, even the development of a centralised ASEAN repository providing information about the regulatory standards and compliance protocols for investors proved unfruitful. As before, navigating the rules concerning the entry and operational compliance obligations of investors continued to rest with national authorities and be defined by non-uniform national standards.

The 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 (ASEAN Secretariat 1996b).[5] 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 an issue 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 towards deeper regionalism and coordination in blocs like the European Union and North American Free Trade Agreement, while intimating that similar developments would need to be realised 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 liberalisation, and that ASEAN would need 'to move faster' (see ASEAN Secretariat 1993, 1995b). Article 2 of the amended AAPPI thus urged members to 'endeavour to simplify and streamline their investment procedures and approval processes [in order] to facilitate investment flows', and it was 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 (ASEAN Secretariat 1996b).

These emendations, however, continued to reaffirm the tacit reification of national standards in setting investment policy, while 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 harbor was 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 Protocol on Dispute Settlement Mechanism (ASEAN Secretariat 1996a), which Article 4 of the amended AAPPI noted would henceforth apply to the settlement of disputes. While notionally a move towards initiating a rules-based dispute settlement system and attempting to decouple dispute procedures from political-cum-bureaucratic negotiation, the Protocol on Dispute Settlement Mechanism 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' (quoted in Greenwalk 2006: 207).[6]

The AAPPI: triumph of nationalism over regionalism?

In terms of the four criteria outlined at the commencement of this article, the AAPPI (1987, 1996) obviously fails on each. The AAPPI preserves the ability of member states to engage in competitive investment promotional measures and investment screening, and to 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 (the major features of the APPI are summarized in Table 3).

The ASEAN Investment Area (AIA) agreement

The AIA agreement is the most comprehensive statement made by ASEAN on investment liberalisation to date (see ASEAN Secretariat 1998a; see also

Table 3. Major features of the AAPPI (1987, 1996).

	Present	Absent	Implementation/ administrative authority
Non-discrimination clause	√		N
Fair and 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	

Notes:
N = National ASEAN Secretariat.
R = Regional ASEAN Secretariat.
*Attempted as part of the Protocol on Dispute Settlement Mechanism (ASEAN Secretariat 1996a).

ASEAN Secretariat 2001). Ratified in October 1998 and amended in 2001, the AIA agreement embodies a series of 'schemes, action plans, and specific programs' that define the contemporary contours of ASEAN's investment regime (ASEAN Secretariat 1998b: 3). Its coverage extends to various forms of FDI, excluding portfolio investment or investment pertaining to matters falling under the ASEAN Agreement on Services (see ASEAN Secretariat 1995a; 2003c).

The key instruments in the agreement are contained in Article 7 and cover four main areas. The first aims at an immediate liberalisation 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 TELs and SLs. In addition, Article 7 sets in place a timeline for the phase-out of the TELs (2010), except for Lao PDR, Vietnam (2013) and Myanmar (2015). Article 7 also stipulates procedures for the recurrent review of the TELs and SLs via a newly formed ministerial-level AIA Council responsible for

oversight, coordination and implementation of the AIA agreement among member states (Kee and Mirza 2004: 209). Finally, and 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 (ASEAN Secretariat 1998a: Article 11).

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, and (e) mining and quarrying (ASEAN Secretariat 2001). In addition, the 2001 protocol accelerated the phase-out of the TEL for the manufacturing sector to 2003 (except for Cambodia, Lao PDR and Vietnam [2010]).

The AIA agreement and investment liberalisation: fact or fiction?

Despite being the most comprehensive agreement on investment liberalisation produced by ASEAN, the AIA agreement also highlights a series of tensions concerning nationalist economic protectionism and growth objectives, and broader philosophical debates about the role of state sponsorship in the promotion of domestic multinational enterprise. 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 agreement 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 ratification reveal an environment fraught with anxiety. Malaysia, for example, strongly supported the AIA agreement, 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 agreement 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 multinational corporations (MNCs) using the grace period [clause] before foreign investors would be accorded the same privileges' (Nesadurai 2003: 113). Rather than being conceived strictly as a means of investment liberalisation, the AIA agreement 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 agreement thus represents a medium for investment liberalisation and regional protectionism.

These competing policy concerns explain the contradictions evident in the various articles of the AIA agreement. The instigation of a coordinating authority in the form of an AIA Council, for example, marked a significant step forward in institutionalising 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 agreement and the institutional architecture of the AIA Council, ASEAN members signalled their intention to get serious about policy coordination and investment policy harmonisation, and to make more transparent their national investment regimes. Indeed, the ministerial-level AIA Council moved quickly to institutionalise its processes, forming a Coordinating Committee on Investment, meeting four to five times a year in order 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 Statistics marked, for the first time, the adoption of formal procedural mechanisms in order to harmonise FDI data collection and measurement, and thus provide annualised comparative regional FDI data to the AIA Council and policy planners (Kee and Mirza 2004: 209).

While the AIA agreement marks a significant advance in terms of the institutional environment governing intra-regional investment, the articles of the agreement and their impact on investment liberalisation are more problematic. For example, while the AIA agreement accelerated the phase-out schedule for the TELs (2003 for ASEAN 6 and 2010 for Vietnam, Lao PDR, Cambodia and Myanmar), it left indefinite the phase-out period for the SLs, 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 liberalisation 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, for example, seemed to step back from a default blanket clause covering 'all' industries, to a more exclusionist language covering only named sectors (the manufacturing, agriculture, fishery, forestry, and mining and quarrying sectors). That the intent was to circumscribe coverage is revealed in Article 1.3, which states that 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 agreement thus speaks strongly to the inability of ASEAN to address intra-regional investment liberalisation in

strategic sectors like telecommunications, financial services, infrastructure, transportation or print and electronic broadcast media, where national conditionality clauses and protectionist restrictions remain strong (ASEAN Secretariat 2001).

The impact of the AIA agreement is also problematic in terms of its stated achievements to roll back closed or restricted sectors to foreign investment, or quicken progress in removing or delisting sectors from the TELs and SLs. Indeed, there is ample evidence to suggest that investment protectionism or sectoral sheltering persists among many ASEAN states. As Appendices A and B highlight, for example, the TELs and SLs for various countries continue to be populated by numerous industry sectors where investment is either prohibited or subject to stringent conditionality clauses limiting investment access. Likewise, the TELs and SLs for services incidental to the manufacturing, agriculture, fishery, forestry, and mining and quarrying sectors (Appendix B) also continue to be heavily populated or subject to stringent conditionality requirements, including ceilings on foreign equity participation, joint venture requirements, forced government–business cooperation contracts, directed sourcing requirements, domestic market access restrictions, export-only clauses, stipulated land use provisions, or various approvals 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 restrict investment access, which affects domestic small- and medium-sized enterprises (SMEs) in the manufacturing, forestry, fishery, agriculture and mining sectors. Equally, the retailing, food and beverage processing/manufacturing, construction and allied services, electronic component manufacturing, hospitality, and 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 utilise protectionist measures, despite the stated ambitions of the AIA agreement.

The TELs and SLs, however, do not betray the full extent to which investment screening and tacit investment protectionism persist among ASEAN states. Two factors would seem to be at work in this regard. First, regional political pressures and the need to 'keep up appearances' in terms of moving the AIA agreement forward and achieving aspirational targets are doubtlessly leading to the under-reporting of investment conditionality clauses and restrictions. While the ASEAN Secretariat thus dutifully carries the TELs and SLs provided by member states, when cross-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 the conditionality requirements listed with the ASEAN Secretariat. Second, the compliance requirements stipulated by the AIA agreement in terms of the phasing out of the TELs by 2003 (except for

Cambodia, Lao PDR and Vietnam [2010]), and ratified as part of the 2001 amended AIA agreement, appear to have produced a flurry of reclassifications and redesignations. Vietnam, for example, publishes a TEL in which it designates 'nil' sectors under the category 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 and are either subject to prohibition or business cooperation contracts, equity or export-only requirements (ASEAN Secretariat 2009). Likewise, while Indonesia does not publish a TEL in line with the 2003 phase-out agreement under the amended 2001 AIA protocol, it does publish 'Presidential Regulations', which essentially circumvent the TEL. 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' or reserved for domestic SMEs; 36 sectors where investment requires a domestic joint venture partnership; 129 sectors where capital ownership restrictions and foreign equity ceilings are imposed; 20 sectors where location restrictions are imposed; 26 sectors where 'special permits' are required; 48 sectors with 100 percent domestic capital requirements; and 17 sectors where combined foreign capital ownership ceilings and locality requirements are imposed (Republic of Indonesia 2007).

Similar trends are also apparent in the case of Malaysia and Thailand, which no longer publish a TEL and claim 'nil' inclusion in terms of prohibited sectors, but where the SL has been modified to include a series of increasing conditionality clauses that range from restricted geographic zones and location clauses, equity restrictions, directed sourcing requirements, restricted market access or export quota requirements. Perhaps more obvious, however, has been the trend to default to blanket investment screening, where obligations under the AIA agreement are ostensibly adhered to in terms of non-published investment restrictions or closed sectors, but where *all* foreign investment is subject to a national approvals 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 (OECD 2004: 93). But to what degree it represents investment liberalisation 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 from investment competition. What it does do, however, is give the appearance of investment liberalisation, if only by usurping the need to proscribe prohibitions or restrictions on investment. In the context of the AIA agreement, 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 agreement. First, a combination of reclassification and redesignation has seen the migration of nominated sectors from the TELs to the SLs, where sectors previously 'closed' are now listed as 'open' but with stringent conditionality clauses that effectively render them protected. Second, policy changes in some ASEAN states towards a non-proscribed investment regime reliant on permit and approvals processes, and thus a default investment screening system, have removed the need for blanket investment prohibitions 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 agreement. Specifically, it highlights the failure of the AIA agreement to nurture the emergence of a more centralised investment governance regime mediated through regional authorities, and policy failure in terms of ASEAN's ability to coordinate standardised national investment provisions. Rather than restrain national discretionary investment screening or the imposition of conditionality clauses, the AIA agreement continues to display weaknesses that allow it to be outmanoeuvred by protectionist domestic political constituencies (see Table 4 for a summary of the AIA investment provisions). Despite the decade-long operation of the AIA agreement, its impact on investment liberalisation must thus be judged as problematic.

Intra-ASEAN investment patterns and the AIA agreement

Perhaps most disappointing and illustrative of the failure of the AIA agreement 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, intra-ASEAN investment flows remain 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 (severe acute respiratory syndrome) in 2003–4. Tables 5 and 6, for example, reveal little evidence that the AIA agreement is leading to enhanced investment penetration among ASEAN states. Rather, two obvious and concerning trends appear evident. First is the predominance of inflows to Malaysia, Singapore and Thailand. Over the 10-year period from 1995 to 2004, for example, Malaysia averaged 22.86 percent of all intra-ASEAN FDI inflows, Singapore 24 percent and Thailand 22.9 percent. Just three of ASEAN's 10 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 percent of intra-ASEAN investment outflows between 1995 and 2003, while Malaysia averaged 16.3 percent. Just two of ASEAN's 10 member states thus accounted for nearly 80 percent of investment capital flowing into the rest of ASEAN.

Table 4. Major features of the AIA agreement (1998, 2001).

	Present	Absent	Implementation/ administrative authority
Non-discrimination clause	√		N
National treatment clause	√*		
Rules-based dispute resolution process via independent body		√**	
Treaty review mechanism		√	Non-formalised 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 AEM)
Codified treaty reporting processes	√		N, R (stipulated annualised 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		
Allows for autonomous national screening of FDI	Yes		

Notes:
N = National ASEAN Secretariat.
R = Regional ASEAN Secretariat.
*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, and mining and quarrying).
**The AIA agreement does not contain a dedicated dispute settlement mechanism, but the agreement comes under the auspices of the Protocol on Dispute Settlement Mechanism (ASEAN Secretariat 1996a) and, as of 2004, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (ASEAN Secretariat 2004). Neither of these mechanisms contains firm state dispute settlement mechanisms.

These trends betray a number of challenges facing ASEAN which make the prospects for deeper investment liberalisation problematic. 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 intermediate 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,

Table 5. 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	10.60	21.23	36.79	25
Percent of total ASEAN	6.70	8.26	7.35	8.84	0.19	0.74	0.40	0.58	1.59	1.05
Cambodia	–	–	–	–	–	–	–	9	20	32
Percent of total ASEAN	–	–	–	–	–	–	–	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
Percent of total ASEAN	13.10	4.52	5.20	–	–	–	–	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
Percent 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	1475.80	2261.49	469.94	535.99	258.12	79.99	0.02	251.12	980
Percent of total ASEAN	36.20	34.50	43.19	16.88	24.17	18.08	3	–	10.91	41.24
Myanmar	96.70	228.60	323.30	153.90	41.20	74.02	67.36	25.11	24	12
Percent of total ASEAN	2	5.35	6.17	5.50	1.85	5.18	1.41	0.69	1.04	0.50
Philippines	241.59	74.88	142.87	106.89	110.92	126.53	222.30	37.94	175.10	116
Percent of total ASEAN	5.20	1.84	2.72	3.82	5	8.86	8.44	1.04	7.60	4.88
Singapore	1165.07	1206.71	941.57	794.57	632.10	353	356.90	774	637	649
Percent of total ASEAN	25.10	28.20	15.19	28.41	28.50	24.70	13.56	21.29	27.68	27.30
Thailand	160.56	308.10	297.50	569.60	572.04	389.03	1650	1223	670	336
Percent of total ASEAN	3.46	7.20	5.68	20.37	25.80	27.20	62.69	33.60	29.10	14.14
Vietnam	387.25	328.70	547.20	398.70	289.26	202.39	241.49	200.43	100.40	243
Percent of total ASEAN	8.36	7.60	10.45	14.25	13	14.10	9.17	5.51	4.36	10.20
Total	4627.41	4271.81	5235.71	2796.12 (−38.36)	2217.14 (−427.83)	1427.40 (−232.55)	2631.70 (−239.98)	3635.24	2301.08	2376

Note: *Negative values in terms of net outflows of FDI have not been imputed into the calculations.
Source: ASEAN Secretariat 2009.

Table 6. 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
Percent 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
Percent 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	384.40	228.33
Percent total of ASEAN	11.79	14.47	9.57	12.21	24.07	22.56	13.86	10.80	–
Laos	0.01	0.01	0.01	–	0.57	10.92	0.16	–	0.20
Percent total of ASEAN	–	–	–	–	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
Percent total of ASEAN	16.85	16.70	11.91	21.20	18	22.79	4.85	10.94	23.91
Myanmar	3.95	2.20	6.96	0.50	2.35	8.14	3.42	12.98	7.10
Percent total of ASEAN	0.08	0.05	0.13	0.01	0.12	0.59	0.13	0.36	0.42
Philippines*	89.60	71.09	17.44	−26.36	−22.43	58.94	33.12	15.18	−2.79
Percent 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
Percent total of ASEAN	65.30	56.06	67.85	59.40	49.51	46.63	77.99	68.47	78.50
Thailand*	181.44	321.95	472.13	155.69	123.75	−181.38	−66.69	278.06	108.25
Percent total of ASEAN	3.97	7.53	9	5.74	6.83	–	–	7.81	6.48
Vietnam	0.77	0.44	1.29	1.78	4.41	5.24	2.21	37.20	4.91
Percent total of ASEAN	0.01	0.01	0.02	0.06	0.24	0.38	0.08	1.04	0.29
Total	4564.83	4271.83	5235.73	2727.10	1811.73	1376.24	2458.42	3557.14	1667.87

Note: *Negative values in terms of net outflows of FDI have not been imputed into the calculations.
Source: ASEAN Secretariat.

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.

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 biofuels (palm oil in the case of Malaysia and Indonesia; automobile parts manufacture and assembly in the case of Thailand and Malaysia; and 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 Organisation for Economic Co-operation and Development (OECD) recently described as a 'proliferation of incentives' to attract investment, which national governments use as a means of driving their development (OECD 2004: 93; see also the discussion in Jarvis and Welch 2011). Rather than seeing these abate or migrate to regional incentive schemes, as one might expect if ASEAN were maturating towards 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 that 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 percent of GDP, or some 5 percent of non-oil revenues; for the Philippines, it runs to some 1 percent of GDP, or US$2.5 billion of forgone taxation revenues year-on-year; and it is as much as 1.7 percent of GDP for Malaysia (OECD 2004: 99–100). 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 percent in 1990 to between 17 and 19 percent in 2003, with China now absorbing upwards of 50 percent of all FDI into Asia (Jarvis 2004: 1).

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, majority owned by former Thai prime minister Thaksin Shinawatra, for example, triggered an eventual military coup and the removal of Thaksin due to fears in part reflecting the sale

of telecommunications assets to foreign regional interests (Kazmin 2008). Similarly, Temasek's investment via ST Telemedia and Singapore Technologies and their purchase of a 41.9 percent stake in Indosat, Indonesia's satellite telecommunications company, met with Indonesian resentment and various legal manoeuvrings by the Indonesian anti-monopoly watchdog, which announced in November 2007 that it would move to impose sanctions and fine Temasek (Guerin 2007).

Recent examples such as these highlight enduring problems that lessen, or at least render problematic, the prospects for engineering further agreements which would deepen investment liberalisation 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.[7] Finding meaningful ways beyond such political stumbling blocks will be no easy feat.

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 liberalisation have been modest (see, for example, Conde 2007). How might we explain these outcomes? ASEAN, after all, outwardly appears to have all the necessary institutional apparatus and formalised agreements necessary to propel itself forward and achieve its stated ambitions. If regionalism reflects the amalgam of state interests and negotiated settlements between states, then ASEAN should be well on its way to a form of supra-nationalism. Clearly, it is not. But why?

The ASEAN–European Union 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 subnational contexts that empower political elites and undergird 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 states vulnerable to captive interests and powerful domestic political constituencies. Lao PDR, Cambodia, Myanmar and Vietnam, by contrast, remain captured by specific sets of interests that reflect painful episodic events in state-making, decolonisation 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 subnational politics.

Understanding the vexed outcomes of ASEAN's attempts at investment liberalisation might thus be better understood as a consequence of a complex and often messy amalgam of sectional interests, operating at both the national *and* subnational level, which historically have impacted the efficacy of ASEAN's attempts to construct a proactive form of regionalism. As Carroll and Sovacool (2010: 627–28) 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 South-East Asia and the case of ASEAN, regionalism is better appreciated as a contested domain, or what they refer to as 'contested regionalism'.

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 (2010), for example, ASEAN states need to be broken down into their complex parts. They are 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 (for example, the Perusahaan Listrik Negara [PLN] and Pertamina in Indonesia; Temasek Holdings and the Government Investment Corporation in Singapore; the Communications Authority of Thailand and the Electricity Generation Authority of Thailand; and Petronas in Malaysia); as well as powerful networks of domestic capital interests—for example, the ethnic Chinese business networks reflective of the Chinese diaspora throughout South-East Asia, and the ethno-political nationalisms evident in Malaysia, Indonesia, Vietnam and Myanmar.

As Carroll and Sovacool (2010: 627) 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 mould the emergence of regionalism in ways that are not exclusively defined by state-to-state interests or the primacy of a security problematic. 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 realise investment liberalisation represents the persistence of nascent ethno-national rivalries, which 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 South-East Asia, the desire to promote Bumiputera business interests frequently produces disingenuous policy preferences, often corralling limited national resources for 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 liberalisation 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 growth in demand for electricity and massive capital expenditure requirements have not translated into intra-regional liberalisation 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 (IPPs) from external competition, lifting foreign ownership ceilings to 95 percent of registered capital, but limiting foreign IPPs to build projects of not less than 10,000 megawatts and in the process protecting PLN as the dominant supplier of electricity.[8] 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 South-East Asian states and 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 subnational amalgams of interests in member states is thus one important element which explains the limited regionalism that ASEAN represents.

Where to next? The future of investment liberalisation in ASEAN

Despite ASEAN's lacklustre achievements in intra-regional investment liberalisation, individual member states have nonetheless displayed a zeal for investment liberalisation, 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 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 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 liberalisation, in the process circumscribing ASEAN's role as an investment bloc (see, for example, Greacen and Greacen 2004: 527; see also Jarvis 2010). As Table 7 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 7

Table 7. ASEAN member state BITs.

Country	Total number of BITs signed by ASEAN member states	Number of BITs signed with an ASEAN member state	Percentage of total number of BITs signed with an ASEAN member state
Brunei	5	0	0
Cambodia	16	6	38
Indonesia	60	7	12
Lao PDR	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 (2007b). See also *WorldTradeLaw.net* (2006).

also demonstrates, however, the pattern of BITs lies beyond the region. Excluding Myanmar, which remains blacklisted among most Western states, and Cambodia and Lao PDR, where limited investment opportunities have constrained the engagement of extra-regional parties, the vast majority of BITs entered into by ASEAN members (some 85 percent or 278 BITs) have been with *non*-ASEAN states.

This trend is prescient of the likely direction of investment liberalisation in South-East Asia in the future—one potentially dominated by a 'spaghetti bowl' effect of overlapping BITs and bilateral trade agreements, which will collectively define the region's investment architecture. The implications of this are varied, but all of them are potentially significant for ASEAN. For example, with the failure of World Trade Organization talks in 2006 to realise further liberalisation 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 favoured instruments. The problem for ASEAN, of course, is that they effectively usurp or bypass regionally orchestrated agreements, such as the AIA agreement, and pose the risk of marginalising ASEAN as the region's most proactive and central instrument for securing interstate 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 liberalisation measures and superior welfare effects than has been the case with the AIA agreement. 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 or breach of investment guarantees. This is not the case with the AIA agreement, 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 (ASEAN Secretariat 1996a) and, second, in the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (APEDSM; ASEAN Secretariat 2004). Neither of the agreements is geared to investment disputes per se and they speak more to state–state rather than firm–state dispute settlement procedures. Regardless, as a medium for dispute resolution, the APEDSM still reverts to political processes. As Walter Woon, former Attorney General of Singapore, noted:

> The heart of the Vientiane Protocol [APEDSM] ... 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 decision. 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. (Woon 2008)

The APEDSM, in other words, is not strictly a legal-based instrument, but reverts to economic officials and political organs who can disregard the recommendations of the appointed adjudication panel. This points to shortcomings in the AIA agreement, and explains the prevalence and deepening web of BITs entered into by ASEAN member states. It also points to a further irony in the liberalisation 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 bilateral trade agreements, for example, point to much deeper levels of penetration into protectionist practices than those achieved by the AIA agreement or the AAPPI. In the case of tariff liberalisation, for example, one commentator went so far as 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. (quoted in Pagaduan-Araullo 2007)

Paradoxically, then, many of the standards associated with liberalisation highlighted at the outset of this article—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 mod-

erated 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 and outmanoeuvred, and is in danger of becoming outdated if renewed commitment to investment liberalisation is not forthcoming. Making ASEAN relevant to investment liberalisation and to enhancing investment volumes across its membership base will require considerably more effort than has thus far been displayed. Much, of course, depends on the way in which the long awaited implementation of the ACIA (signed in 2009) is mediated in the region and used to support investment liberalization. It might, however, be premature and overly optimistic to assume that the ACIA will prove to be the panacea to reinvigorating investment liberalisation 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. (Lohman and Kim 2008: 12)

Historically, ASEAN has been long on talk and short on concrete deliverables. Singapore's former Minister for Foreign Affairs, 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 marginalised by its dialogue partners and international investors alike (quoted in Tay *et al.* 2001: ix). Transforming ASEAN beyond what Hadi Soesastro (2001: 308) 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. The ambitions are, again, clear and concisely articulated. Whether, however, these ambitions materialise 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.

Notes

1. See ASEAN Secretariat web page and 'Overview', <www.aseansec.org/64.htm>.
2. The AAPPI was signed in 1987 between the original six ASEAN states (Indonesia, Malaysia, the Philippines, Singapore, Thailand and Brunei). It was subsequently amended in 1996 with the accession of Vietnam to the association.

3. Article X.2 of the AAPPI (1987) nominates the International Centre for Settlement of Investment Disputes, the United Nations Commission on International Trade Law, the Regional Centre for Arbitration at Kula Lumpur 'or any other centre for regional arbitration in ASEAN, whichever the parties to the dispute mutually agree to appoint for the purposes of conducting the arbitration'.
4. Negotiations to explore the possibility of formalising an ASEAN investment agreement were commenced soon after the Second ASEAN Heads of Government Meeting in Kuala Lumpur in 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' (ASEAN Secretariat 1977: Points 16, 25).
5. 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.
6. Only in November 2004 did ASEAN adopt a formal dispute resolution mechanism titled the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (APEDSM; see ASEAN Secretariat 2004). In 2004, the APEDSM was eventually ratified.
7. 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 formalised. At the Tenth AIA Council Meeting on 23 August 2007, the AIA Council agreed to 'complete the ACIA by the 11th AIA Council meeting in Singapore in August, 2008' (ASEAN Secretariat 2007b).
8. Interview with PLN, Jakarta, 8 April 2009. Only one foreign IPP build project of 10,000 megawatts is currently under way. It is operated by a Chinese consortium and is the first large foreign IPP project in Indonesia in over 10 years. These trends are also evident in Thailand (see, for example, Jarvis 2010).

References

ASEAN (Association of Southeast Asian Nations) Secretariat, 1977. 'Joint communiqué, the second ASEAN heads of government meeting', Kuala Lumpur, 4–5 August, <www.aseansec.org/1224.htm>.

ASEAN (Association of Southeast Asian Nations) Secretariat, 1987a. 'Agreement among the government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the promotion and protection of investments', Manila, 15 December, <www.aseansec.org/6464.htm>.

ASEAN (Association of Southeast Asian Nations) Secretariat, 1987b. 'Joint communiqué, the third ASEAN heads of government meeting', Manila, 14–15 December, <www.aseansec.org/1225.htm>.

ASEAN (Association of Southeast Asian Nations) Secretariat, 1993. 'Joint communiqué of the twenty-sixth ASEAN ministerial meeting', Singapore, 23–24 July, <www.aseansec.org/2009.htm>.

ASEAN (Association of Southeast Asian Nations) Secretariat, 1995a. 'ASEAN framework agreement on services', Bangkok, 15 December, <www.aseansec.org/19087.htm>.

ASEAN (Association of Southeast Asian Nations) Secretariat, 1995b. 'Joint press statement of the 27th ASEAN Economic Ministers Meeting (AEM)', Bandar Seri Begawan, Brunei Darussalam, 7–8 September, <www.aseansec.org/2116.htm >.

ASEAN (Association of Southeast Asian Nations) Secretariat, 1996a. 'Protocol on dispute settlement mechanism', Manila, 20 November, <www.aseansec.org/16654.htm>.

ASEAN (Association of Southeast Asian Nations) Secretariat, 1996b. 'Protocol to amend the agreement among the governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom

of Thailand for the promotion and protection of investments', Jakarta, 12 September, <www.aseansec.org/6465.htm>.
ASEAN (Association of Southeast Asian Nations) Secretariat, 1998a. 'Framework agreement on the ASEAN investment area', 8 October, <www.aseansec.org/2280.htm>.
ASEAN (Association of Southeast Asian Nations) Secretariat, 1998b. *Handbook of investment agreements in ASEAN* (Jakarta: ASEAN Secretariat).
ASEAN (Association of Southeast Asian Nations) Secretariat, 2001. 'Protocol to amend the framework agreement on the ASEAN investment area', Ha Noi, 14 September, <www.aseansec.org/6467.htm>.
ASEAN (Association of Southeast Asian Nations) Secretariat, 2003a. 'ASEAN: an overview declaration vision 2020', <http://www.aseansec.org/2357.htm>.
ASEAN (Association of Southeast Asian Nations) Secretariat, 2003b. *ASEAN Statistical Yearbook 2003* (Jakarta: ASEAN Secretariat).
ASEAN (Association of Southeast Asian Nations) Secretariat, 2003c. 'Protocol to amend the ASEAN framework agreement on services', Phnom Penh, 2 September, <www.aseansec.org/AFAS_Amendment_Protocol.pdf>.
ASEAN (Association of Southeast Asian Nations) Secretariat, 2004. 'ASEAN protocol on enhanced dispute settlement mechanism', Vientiane, Lao PDR, 29 November, <www.aseansec.org/16754.htm>.
ASEAN (Association of Southeast Asian Nations) Secretariat, 2006. *ASEAN Statistical Yearbook 2006* (Jakarta: ASEAN Secretariat).
ASEAN (Association of Southeast Asian Nations) Secretariat, 2007a. 'ASEAN investment report 2007', <www.asean.org/21406.pdf>.
ASEAN (Association of Southeast Asian Nations) Secretariat, 2007b. 'Tenth ASEAN investment area (AIA) council meeting, joint media statement', Makati City, Philippines, 23 August, <www.aseansec.org/20834.htm>.
ASEAN (Association of Southeast Asian Nations) Secretariat, 2009a. 'Foreign direct investment statistics', <www.aseansec.org/18144.htm>.
ASEAN (Association of Southeast Asian Nations) Secretariat, 2009b. 'List of manufacturing industries to be promoted for foreign investment into Lao PDR', <www.aseansec.org/6504.htm>.
ASEAN (Association of Southeast Asian Nations) Secretariat, 2009c. 'Temporary exclusion list for the opening up of industries for the manufacturing, agriculture, fishery, forestry, mining and quarrying sectors: Vietnam', <www.aseansec.org/21413.zip>.
ASEAN (Association of Southeast Asian Nations) Secretariat, 2009d. 'ASEAN foreign investment statistics', <www.aseansec.org/documents/AIR2009.pdf>.
Carroll, Toby and Benjamin Sovacool, 2010. 'Pipelines, crisis and capital: understanding the contested regionalism of Southeast Asia', *Pacific Review*, 23(5): 625–47.
Ching, Yu and Charles Adams, 2002. 'Trends in global and regional foreign direct investment flows', Regional Office for Asia and the Pacific, International Monetary Fund. Mimeo.
Conde, Carlos H., 2007. 'ASEAN pursues EU-style regional integration', *International Herald Tribune*, 15 January.
Cross, Adam R. and Hui Tan, 2004. 'The impact of China's WTO accession on Southeast Asian foreign direct investment', in Nick J. Freeman and Frank L. Bartels (eds), *The future of foreign investment in Southeast Asia* (London: RoutledgeCurzon), pp. 125–54.
Greacen, Chuenchom Sangarasri and Chris Greacen, 2004. 'Thailand's electricity reforms: privatization of benefits and socialization of costs and risks', *Pacific Affairs*, 77(3): 517–41.
Greenwalk, Alyssa, 2006. 'The ASEAN–China free trade area (ACFTA): a legal response to China's economic rise', *Duke Journal of Comparative and International Law*, 16(1): 193–217.
Guerin, Bill, 2007. 'Telecom tangle for Singapore's Temasek', *Asia Times Online*, 22 November, <www.atimes.com/atimes/Southeast_Asia/IK22Ae01.html>.

Hew, Denis (ed.), 2007. *Brick by brick: the building of an ASEAN economic community* (Singapore: Institute of Southeast Asian Studies).

Jarvis, Darryl S. L., 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.

Jarvis, Darryl S. L., 2010. 'Institutional processes and regulatory risk: a case study of the Thai energy sector', *Regulation and Governance*, 4(2): 175–202.

Jarvis, Darryl S. L. and Anthony Welch, 2011. 'Structural changes, economic challenges and political accommodation: managing the rise of China in Southeast Asia', in Darryl S. L. Jarvis and Anthony Welch (eds), *ASEAN industries and the challenge from China* (Basingstoke: Palgrave Macmillan), pp. 1–18.

Kazmin, Amy, 2008. 'Temasek to reduce stake in Shin Corp', *Financial Times*, 17 June.

Kee, Hwee Wee and 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: Routledge), pp. 201–54.

Lohman, Walter and Anthony B. Kim, 2008. *Enabling ASEAN's economic vision,* Backgrounder No. 2101 (Washington, DC: The Heritage Foundation).

Nesadurai, Helen E. S., 2003. *Globalization, domestic politics and regionalism: the ASEAN free trade area* (London: Routledge).

OECD (Organisation for Economic Co-operation and Development), 1999. *Foreign direct investment and recovery in Southeast Asia* (Paris: Centre for Co-operation with Non-Members, OECD).

OECD (Organisation for Economic Co-operation and Development), 2004. *International investment perspectives* (Paris: OECD).

Pagaduan-Araullo, Carol, 2007. 'ASEAN hype', *Bulatat (Manila)*, 7(26), 5–11 August, <www.bilaterals.org/spip.php?article9251>.

Quazi, Rahim, 2007. 'Economic freedom and foreign direct investment in East Asia', *Journal of the Asia Pacific Economy*, 12(3): 329–44.

Republic of Indonesia, 2007. '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', <www.bkpm.go.id/file_uploaded/PP_77_2007_en.pdf>.

Sakakibara, Eisuke and Sharon Yamakawa, 2003. *Regional integration in East Asia: challenges and opportunities. Part II: trade, finance and integration*, World Bank Policy Research Working Paper No. 3079, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=636441>.

Soesastro, Hadi, 2001. 'ASEAN in 2030: the long view', in Simon S. C. Tay, Jesus P. Estanislao and Hadi Soesastro (eds), *Reinventing ASEAN* (Singapore: Institute of Southeast Asian Studies), pp. 226–42.

Tay, Simon S. C., Jesus P. Estanislao and Hadi Soesastro, 2001. *Reinventing ASEAN* (Singapore: Institute of Southeast Asian Studies).

Thanadsillapakul, Lawan, 2001. 'International investment law: the investment regime of ASEAN countries', *Thailand Law Source*, <http://members.tripod.com/asialaw/articles/lawaninvestment.html>.

UNCTAD (United Nations Conference on Trade and Development), 2003. *World investment report 2003: FDI policies for development: national and international perspectives* (New York: United Nations).

UNCTAD (United Nations Conference on Trade and Development), 2007a. *Development implications of international investment agreements*, International Investment Agreements Monitor No. 2 (New York: United Nations).

UNCTAD (United Nations Conference on Trade and Development), 2007b. *World investment report 2007: transnational corporations, extractive industries and development* (New York: United Nations).

Woon, Walter, 2008. 'The ASEAN charter dispute settlement mechanisms', <www.agc.gov.my/agc/agc/rev/agcjc/3rd/pdf/Singapore-The_ASEAN_Charter_Dispute_Settlement_Mechanisms.pdf>.

WorldTradeLaw.net, 2006. 'Bilateral and regional trade agreements notified to the WTO', <www.worldtradelaw.net/fta/ftadatabase/ftas.asp>.

Appendix A. ASEAN FDI TELs and SLs 2008: manufacturing, agriculture, fishery, forestry, and mining and quarrying sectors

Country	TEL/restricted investment Sector/industry	Restriction/conditionality requirements	SL Sector/industry	Restriction/conditionality requirements
Brunei Darussalam*	Growing of cereals and other crops Growing of vegetables Horticulture specialties Nursery products Fruits, nuts, beverage and spice crops	30 percent local participation requirement for eligibility to access government facilities and sales to domestic market	Arms and ammunition Spirits and other alcoholic beverages Fireworks Tobacco and tobacco-substitute products Polluting industries affecting the environment Retail Other manufacturing industries according to previously published list	Prohibited
Indonesia**	Sawn timber; veneer woods industry; plywood industry; laminated veneer lumber	Special permissions and/or approvals required; subject to discretionary conditionality clauses	Food and beverage industries involving preparation of shredded, boiled, fried or jerked meat, salted/pickled fish and other marine biota	Prohibited investment (reserved for small-scale enterprises)
	Woodchip industry	Materials sourcing stipulations/ requirements	Food and beverage industries involving preparation of chips produced from flour flavoured with shrimp/fish; fish/shrimp condiments	Prohibited investment (reserved for small-scale enterprises)
	Security printing; security paper printing; security ink	Permit approvals; ministerial authority and approvals	Food and beverage industries preparing/ processing grains, cereals, legumes and tubers, including rice flours of various kinds, flour made of legumes and flour made of dried cassava	On condition of partnership with small-scale enterprises
	Pulp industry	Clearance/recommendation from relevant ministries; cooperation/ sourcing requirements with small enterprise	Food and beverage industries making bread, cookies and the like	Prohibited investment (reserved for small- scale enterprises)
	Clove, cigarette and other cigarette industries	Joint venture or business cooperation contract with domestic partner as stipulated by government	Postal services	Prohibited
	Port facilities (connecting port)	Maximum equity ownership of 95 percent	Non-ferrous metal industry (lead)	

Appendix A. (*Continued*)

Country	TEL/restricted investment Sector/industry	Restriction/conditionality requirements	SL Sector/industry	Restriction/conditionality requirements
	Agricultural business greater than 25 hectares	Maximum equity restrictions of 49 percent	Cyclamate and saccharin industry	
	Domestic/international sea transportation; port loading facilities; port infrastructure services—jetty, container terminal, liquid bulk terminal, dry bulk terminal; port waste reception facilities		Chlor-alkali industry with mercury-containing materials	
			Alcoholic beverages industry (liquor, wine, and malt beverages)	
			Chemical industry with environmental damageability, such as: pentachlorophenol, dichlorodiphenyltrichloroethane (DDT), dieldrin, chlordane, carbon tetrachloride, chlorofluorocarbon (CFC), methyl bromide, methyl chloroform, halon and the like	
			Air traffic service provider	
			Telecommunication/marine aids to navigation	
			Provider and operator of terminal	
			Public broadcasting service (LPP) of radio and television	
			Management and operation of station monitoring spectrum of radio frequency and satellite orbit equipment/infrastructure	
			Sawmill and plywood operation and manufacture	
Malaysia			Pineapple canning; 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 and Sarawak with source of supply drawn from own plantations
			Sugar refining	Prohibited
			Liquors and alcoholic beverages	Prohibited
			Tobacco processing and cigarettes	Prohibited

Appendix A. (*Continued*)

Country	TEL/restricted investment Sector/industry	Restriction/conditionality requirements	SL Sector/industry	Restriction/conditionality requirements
			Sawn timber, veneer and plywood	Prohibited in peninsular Malaysia and Sabah; permitted in Sarawak
			Wood-based products utilising local logs as raw materials	Prohibited in peninsular Malaysia; permitted in Sabah and Sarawak
Philippines			Manufacturing cooperatives	No (nil) foreign equity permitted
			Agriculture, fishery, mining and quarrying cooperatives	No (nil) foreign equity permitted
			People's small-scale mining programs (mining activities which rely extensively on manual labour using simple implements/ methods, not exceeding 20 hectares with investment not exceeding P10.00 million)	Only Philippine citizens or corporations with a minimum of 60 percent capital owned by Philippine citizens who voluntarily form a cooperative licensed by the Department of Environment and Natural Resources may engage in the extraction/ removal of minerals or ore-bearing materials
Thailand*	Artificially propagated plants or plant breeding	Foreign equity participation restricted to less than 50 percent of registered capital		
	Fishery and marine animal culture Logging from plantations	Foreign capital participation of 50 percent or more of registered capital permitted, subject to: (1) the permission of the Director General of Business Development and approval of Foreign Business Committee; (2) the permission under the law governing the Industrial Estate Authority of Thailand or other related laws		

Appendix A. (*Continued*)

Country	TEL/restricted investment Sector/industry	Restriction/conditionality requirements	SL Sector/industry	Restriction/conditionality requirements
Singapore			Chewing gum, bubble gum, dental chewing gum or any like substance	Prohibited on the basis of safety and social reasons
			Firecrackers/matchsticks	No more licenses issued
			Pig farming	Foreign equity subject to approval of relevant ministry
			Quarrying	
			Publishing and printing of newspapers	
Cambodia			Poisonous chemicals	Prohibited
			Agricultural pesticides/insecticides	
			Any other goods or manufactured items using chemical substances that affect public health and the environment	
			Psychotropic and narcotic substances	
			Electricity production using imported waste products	
			Forestry exploitation/harvesting	
Lao PDR	Manufacture of beverages, including soft drinks, ethyl alcohol, spirits, drinking and mineral water, and fruit juices	Various conditionality clauses imposed at the discretion of the Lao PDR authorities. Conditionality clauses are 'negotiated with the Lao Authorities concerned' and discretionary (ASEAN Secretariat 2009b)	Manufacture of Lao dolls	Prohibited (reserved for Lao nationals)
	Manufacture of cigarettes		Manufacture of products using copper, silver and gold (jewellery)	Subject to joint venture with domestic investors and/or export of 100 percent
	Leather tanning and dressing		Manufacture of Lao musical instruments	Subject to high ratio of local content (use of local raw materials) and/or export
	Manufacture of wood products, including plywood, laminboard, particle board and other wood panels and boards		Manufacture of blankets and mattresses with cotton and kapok	

Appendix A. (*Continued*)

Country	TEL/restricted investment Sector/industry	Restriction/conditionality requirements	SL Sector/industry	Restriction/conditionality requirements
	Sawmilling and planing of wood		Manufacture of beer	
	Manufacture of pulp paper, paper and paperboard		Manufacture of rice noodles	
	Manufacture of soap, detergents, cleaning and polishing preparations, perfumes and toilet preparations			
	Manufacture of polyvinyl chloride (PVC) pipes, plastic products, electrical accessories, rubber thong shoes and electric wires			
	Manufacture of steel rods; casting of iron and steel			
	Manufacture of agricultural tools, machinery and equipment			
	Manufacture of furniture			
Myanmar*	Manufacture of refined petroleum products	Prohibited (reserved for the state sector)	Electricity-generating services other than those permitted by law to private and cooperative electricity-generating services	Prohibited
	Extraction of hardwood and sale of hardwood	Prohibited and subject to national policy on forestry	Sawmilling	Reserved for government
	Exploration, extraction and sale of petroleum	Prohibited, except where prescribed by notification of the government	Aquaculture (fish and prawn breeding)	Reserved for government and village cooperatives
	Fishing of marine fish, prawns and other aquatic organisms	Prohibited, except where prescribed by notification of the government	Forestry and forest plantations	Prohibited
	Manufacture of veneer sheets, plywood, laminboard, particle board and other panels and boards	Prohibited and subject to national policy on forestry	Manufacture of pulp of all kinds	

Appendix A. (*Continued*)

Country	TEL/restricted investment Sector/industry	Restriction/conditionality requirements	SL Sector/industry	Restriction/conditionality requirements
	Air transport service and rail transport service	Prohibited	Exploration, extraction, export and sale of jade and precious stones	
	Production and marketing of basic construction materials, furniture and parquet, using teak extracted and sold by state-owned economic organisations		Distilling, blending, rectifying, bottling and marketing of all kinds of spirits, beverages and non-beverages	
	Ownership of land		Manufacture of malt, liquors, beer and other brewery products, soft beverages, aerated and non-aerated products, and drinking water	
			Manufacture of cigarettes	
			Manufacture of corrugated galvanised iron sheets and sale	
			Provision/investment of telecommunications service, broadcasting or television services of any kind	
			Banking and insurance services	
Vietnam	Processing of aqua-products and canned seafood	Subject to joint venture; stipulated materials and technology requirements; output must be 80 percent for export market	Exploration and processing of oil, gas, and precious and rare minerals	Restricted to joint venture or business cooperation contracts as stipulated by the government
	Vegetable oil production and processing		Air, rail and sea transportation; public passenger, airport and port infrastructure	A minimum of 80 percent must be for the export market
	Dairy processing	Subject to association and development of local raw materials and resources; subject to export requirements	Press, radio and television activities	
			Provision of public telecommunication networks, telecommunication services, and domestic or international courier services	
			Construction and operation of international telecommunication networks	

Appendix A. (*Continued*)

Country	TEL/restricted investment Sector/industry	Restriction/conditionality requirements	SL Sector/industry	Restriction/conditionality requirements
			Production of cement, steel and iron Industrial explosives Aforestation and planting of perennial industrial crops Construction and operation of industrial facilities of industrial zones, export processing zones and high-tech zones Manufacture of: two-wheeled motorised bicycles tourism cars and trucks of less than 10 tons irrigation water pumps medium- and low-voltage electric cables common-use telecommunication cables sea transportation vessels of less than 30,000 tons audio-video products pre-shaped aluminium products common steel for building facing tiles and sanitary ceramics NPK fertiliser detergents common-use paints and building paints lead and acid batteries PVC plastics tyres for bicycles and motorbikes soda and acid electric fans of all kinds bicycles and spare parts electrical transformers of less than 35 kilovolts diesel engines of less than 15 cubic centimetres garments footwear common-use plastic products	

Appendix B. ASEAN FDI TELs and SLs 2008: industries for services incidental to the manufacturing, agriculture, fishery, forestry, and mining and quarrying sectors

Country	TEL/restricted investment Sector/ industry	Restriction/conditionality requirements	SL Sector/industry	Restriction/conditionality requirements
Brunei Darussalam*	Agricultural and animal husbandry service activities on a fee or contract basis Services rendered on a fee or contract basis for the following areas: renting of agricultural machinery/ equipment veterinary services agricultural research/experimental development agricultural market research forest plantations and nurseries forest-based industry processing	Foreign equity participation restricted to a maximum of 70 percent to be eligible to access government facilities and sales to domestic market		
Indonesia**	Livestock market on a fee or contract basis	Prohibited on the basis of national security	Health service facilities	100 percent domestic capital requirement
	Manufacture of food and beverages on a fee or contract basis, including: fruit/vegetable canning; the fruit and vegetable pulverising, juicing and pasting industry; ice cream industry; and cassava starch industry	Restricted to localities near wholesale markets	Private maternity facilities	
	Agricultural cool rooms	Restricted to exported fresh horticulture	Pharmacy services/public chemist	
	Agricultural packaging	Restricted to localities associated with wholesale markets	Pharmaceutical wholesale; pharmaceutical raw material wholesale	
	Agricultural warehousing	Maximum foreign equity participation of 49 percent	Pension funds	
	Scheduled domestic and international public transport services	Maximum foreign equity participation of 55 percent	Private broadcasting service; subscribed broadcasting service; press company	

Appendix B. (*Continued*)

Country	TEL/restricted investment Sector/ industry	Restriction/conditionality requirements	SL Sector/industry	Restriction/conditionality requirements
	Specialised air transport services (medical, crew training, air transport sales agency)	Maximum foreign equity participation of 80 percent	Retailing through the media	
	General cargo transport services		Film distribution (import, export and domestic distribution)	
	Hazardous materials transport services		Technical film production services, facilities and processing	
	Container transport services		Pit sand mining	
	Educational services (basic, middle and higher education)		General medical services; hospital; general clinic	
	Architectural services			
	Engineering and design services			
	Construction services			
	Insurance (life, general, reinsurance, broker)			
Malaysia			Services incidental to manufacturing activities undertaken on a fee or contract basis associated with: pineapple canning, palm oil milling, palm oil refining, sugar refining, liquors and alcoholic beverages, tobacco processing and cigarettes, sawn timber, veneer and plywood production, and wood-based products utilising local logs as raw materials—as specified on the SL and the conditions stipulated therein (see Appendix A)	As stipulated on the general SL (see Appendix A)
			Timber extraction and harvesting services	Closed to foreign investment in peninsular Malaysia and Sabah; 30 percent maximum foreign equity participation for Sarawak and/or subject to case-by-case determination

Appendix B. (*Continued*)

Country	TEL/restricted investment Sector/ industry	Restriction/conditionality requirements	SL Sector/industry	Restriction/conditionality requirements
			Specialised consultancy, advisory and operation services in agriculture, animal husbandry, and the fishery industry	Restricted to a maximum of 30 percent foreign equity participation and/or considered on a case-by-case basis
			Services incidental to oil and gas extraction	
Philippines			Services incidental to the utilisation of marine resources in archipelagic waters, territorial seas and exclusive economic zone (i.e. the taking of marine or freshwater crustaceans, molluscs, aquatic animals or marine materials; the operation of fish hatcheries; the cultivation of edible seaweeds; fish farming, breeding and rearing; and the cultivation of oysters for pearls or food)	Prohibited
			Services related to small-scale mining operations and related services (incidental to quarrying stone, sand and clay; the mining of chemical and fertiliser minerals; and the extraction of salt)	
Thailand*			Services incidental to the newspaper business	Foreign equity participation restricted to less than 50 percent of registered capital
			Services incidental to rice farming, farming or gardening; services related to animal farming	
			Services related to fishery for marine animals	
Singapore			Services incidental to the manufacture of chewing gum, bubble gum, dental chewing gum or any like substance	Prohibited on the basis of safety and social reasons

Appendix B. (*Continued*)

Country	TEL/restricted investment Sector/ industry	Restriction/conditionality requirements	SL Sector/industry	Restriction/conditionality requirements
			Services incidental to the manufacture of firecrackers and matchsticks	No more licenses issued
			Services incidental to quarrying	
			Services related to pig farming	
Cambodia	Not available			
Lao PDR			Services incidental to the manufacture of weapons/ ammunition	Prohibited due to national security, natural environment, public health and/or national culture issues
			Services incidental to the manufacture of narcotic drugs	
			Services incidental to the manufacture of cultural items that are destructive to the national culture and tradition	
			Services incidental to the manufacture of chemical substances and industrial waste that are hazardous to human life and the environment	
Myanmar*	Services related to the manufacture of pharmaceuticals	Subject to permission from the Food and Drug Administration		
	Services for the manufacturing of barite powders from indigenous ores	Prohibited and confined to state-owned corporations		
	Services relating to the manufacture of refined petroleum products	Prohibited unless notified by the government and subject to State-Owned Economic Enterprises Law		
Vietnam	Advertising services	Foreign investment permitted only in the form of a joint venture or business cooperation contract		

Appendix B. (*Continued*)

Country	TEL/restricted investment Sector/ industry	Restriction/conditionality requirements	SL Sector/industry	Restriction/conditionality requirements
	Services related to the production of electronic scales for postal operation	Subject to export and technology requirements		
	Services related to the production of small-capacity microwave equipment, main distribution frame components, subscriber local loop equipment, terminal boxes and wiring cables (telephony)	Prohibited. No investment licenses will be issued		
	Services related to producing small-capacity telephone switching systems, optical fibre terminals and telephone sets	Subject to joint venture or business cooperation contract, or as stipulated by the government		
	Services related to maintaining and repairing electrical and mechanical equipment used in the steel industry			
	Maritime and aviation business services			

Notes: *Brunei Darussalam, Thailand and Myanmar do not publish a SL as such, but include on their TELs restrictions and/or conditionality clauses. These are not indicated for phase-out but only for 'periodic review'.

**Republic of Indonesia 2007.

Source: ASEAN Secretariat.