



# FREE FLOW OF INVESTMENT

## In the ASEAN Economic Community (AEC)





# **FREE FLOW OF INVESTMENT**

## **In the ASEAN Economic Community (AEC)**

Dr Hartmut Janus, [hartmut.janus@giz.de](mailto:hartmut.janus@giz.de)  
Lisa Eifert, [lisa.eifert@giz.de](mailto:lisa.eifert@giz.de)

**GIZ Trainings Course: „Challenges and Opportunities  
of the ASEAN Economic Community 2025”  
Bangkok, 9<sup>th</sup>-11<sup>th</sup> March 2016**



## Outline

- (Foreign Direct) Investment in ASEAN: Numbers, Trends, Players
- Liberalising Investment in ASEAN: the ASEAN Comprehensive Investment Agreement (ACIA)
  - An introduction to the key features of the ACIA
  - Liberalisation, Facilitation and Promotion under the ACIA
  - Investment Protection and Investor-State Dispute Settlement (ISDS) under the ACIA
- Discussion and Conclusions

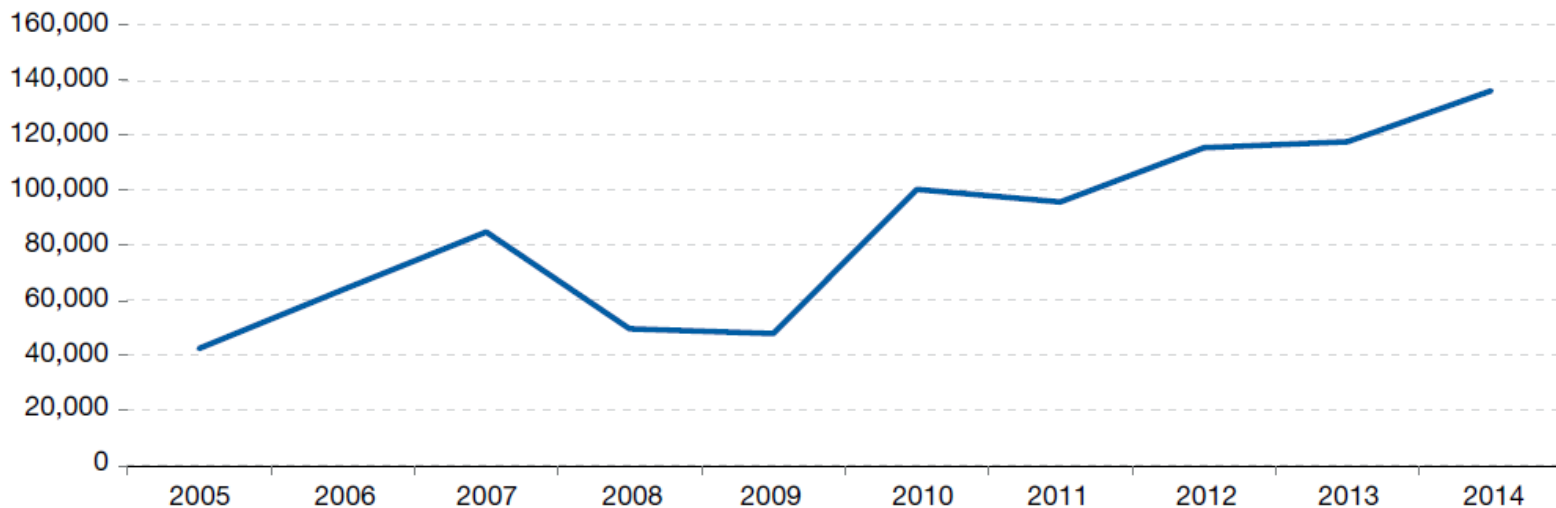


# Part 1: (Foreign Direct) Investment in ASEAN: Numbers, Trends, Players



# Total FDI inflows to ASEAN reached USD 136 billion in 2014

**Figure 1.** FDI flows to the region rose by 16%, to \$136 billion in 2014 – making ASEAN the largest FDI recipient in the developing world  
(Millions of dollars)



Source: ASEAN Secretariat, ASEAN FDI Database (accessed 1 July 2015).



## FDI distribution is highly unequal across ASEAN, with inflows concentrated in SI, IN, and TH in 2014

*Foreign Direct Investment Inflows to ASEAN by Host Country (Million USD)*

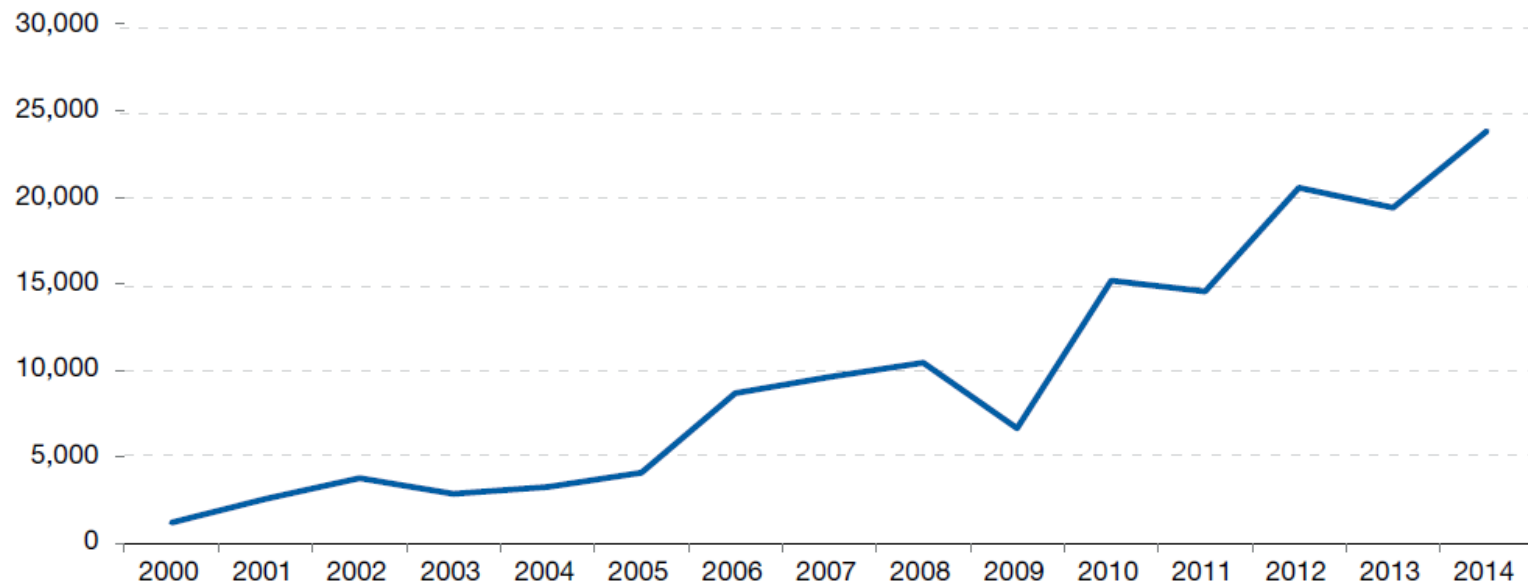
<i>Foreign Direct Investment Inflows to ASEAN by Host Country (Million USD)</i>					
Host Country	2003	2006	2010	2014	Growth rate 2006 - 2014
Singapore	16,532	36,613	55,035	72,098	8.8
Indonesia	-596	4,914	13,771	22,276	20.8
Thailand	5,235	9,460	9,112	11,538	2.5
Malaysia	2,473	6,072	9,156	10,714	7.4
Viet Nam	1,450	2,400	8,000	9,200	18.3
Philippines	491	2,921	1,298	6,201	9.9
Cambodia	84	483	783	1,727	17.3
Myanmar	291	428	2,249	946	10.4
Lao PDR	20	187	333	913	21.9
Brunei	3,298	434	625	568	3.4
ASEAN	29,278	6,912	100,360	136,181	9.9
ASEAN-6	27,433	60,414	88,996	123,395	9.3
CLMV	1,845	3,498	11,364	12,786	17.6



## Intra-ASEAN FDI represents only 18% of total FDI, reaching USD 24 billion in 2014

**Figure 2.**

**Intra-ASEAN investment rose by 26% to \$24.4 billion in 2014**  
(Millions of dollars)



Source: ASEAN Secretariat, ASEAN FDI Database (accessed 1 July 2015).



However, the share of  
Intra-ASEAN FDI is  
high in CLMV  
countries

Share of Intra- to Total FDI Inflows to ASEAN by Host  
Country (in percent)

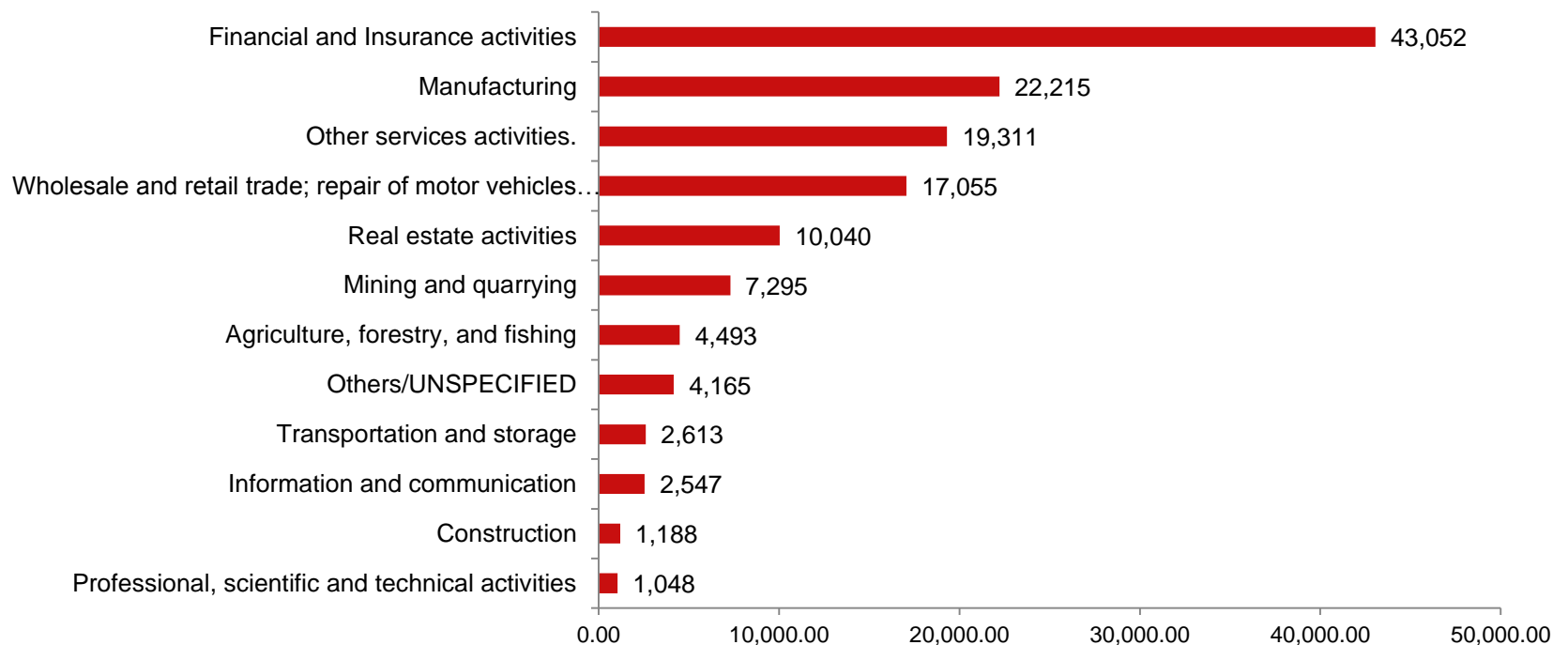
Share of Intra- to Total FDI Inflows to ASEAN by Host Country (in percent)			
Country	2012	2013	2014
Brunei Darussalam	3,6	(8,0)	24,9
Cambodia	33,6	23,4	21,6
Indonesia	39,6	47,3	60,4
Lao PDR	25,0	24,5	15,1
Malaysia	29,9	17,8	25,9
Myanmar	11,2	45,3	72,2
Philippines	5,2	(1,1)	1,3
Singapore	13,6	6,5	6,3
Thailand	(3,2)	9,7	5,7
Viet Nam	15,1	23,4	16,8
<b>Total</b>	<b>17,8</b>	<b>16,5</b>	<b>17,9</b>
ASEAN 6	17,8	15,1	17,5
CLMV	17,4	27,7	21,4





# The bulk of total direct investment in ASEAN goes into the financial sector, followed by manufacturing

## Direct Investment in ASEAN, largest sectors (in million USD)



Source: ASEAN Stats



## The EU is the largest source of FDI to ASEAN, followed by Japan and the US

Inward Direct Investment to ASEAN by source country in 2000 and 2014  
(in USD million)

	2004	2014
Intra-ASEAN	3,278.7	24,377.4
Australia	552.3	5,703.4
China	1,183.2	8,869.4
European Union 28	10,602.3	29,268.5
<i>Germany</i>	<i>1,430.4</i>	<i>156.7</i>
India	96.7	819.5
Japan	6,234.4	13,381.1
Republic of Korea (ROK)	780.5	4,468.9
USA	4,983.1	13,042.3



## Disparities in FDI inflows (1): What are MNEs looking for in ASEAN? Markets, resources, efficiency?

- Markets: Largest markets tend to receive more investment, due to local sales potential and (often) availability of downstream and upstream suppliers
  - For US and Japanese affiliates in ASEAN, local sales (to the national market) represent almost one half of sales – and in recent years, another third of exports go to ASEAN member states
- Resources and efficiency:
  - Export propensity of affiliates is particularly high in Cambodia, Lao PDR, the Philippines and Vietnam – small markets, low wages, resource investment
  - For Cambodia, Lao PDR and Myanmar investment will remain export-oriented in the medium term



## Disparities in FDI inflows (2): Investment climate and FDI restrictiveness vary significantly across ASEAN

Frequent types of FDI restrictions include

- Limitations on foreign equity ownership
- Screening and approval procedures for foreign investors
- Land ownership

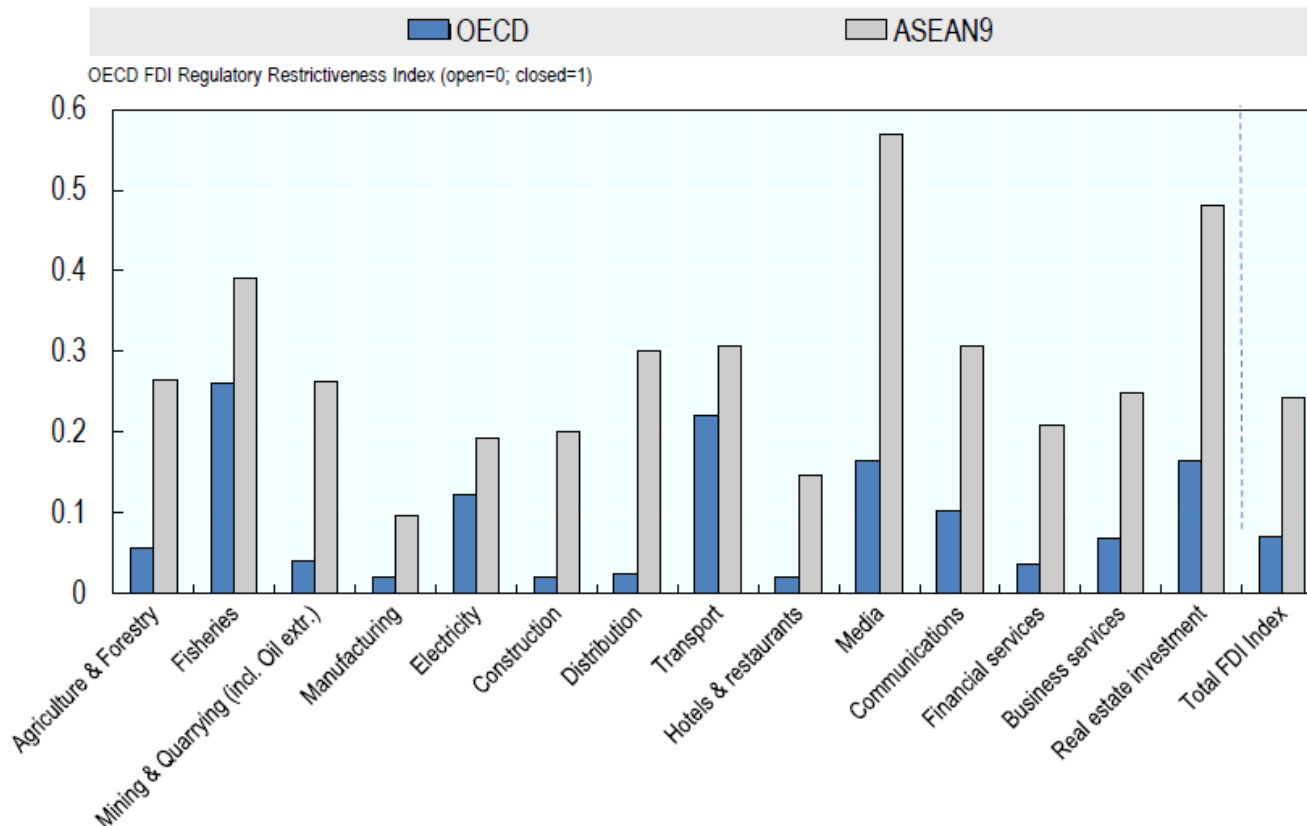
Recent Doing Business Rankings in ASEAN  
(out of 189 countries)

	2014	2015
Singapore	1	1
Malaysia	20	18
Thailand	28	26
Vietnam	72	78
Philippines	86	95
Brunei	98	101
Indonesia	117	114
Cambodia	134	135
Lao PDR	155	148
Myanmar	178	177

Source: World Bank, Doing Business



## ASEAN countries are generally more restrictive across sectors than OECD countries

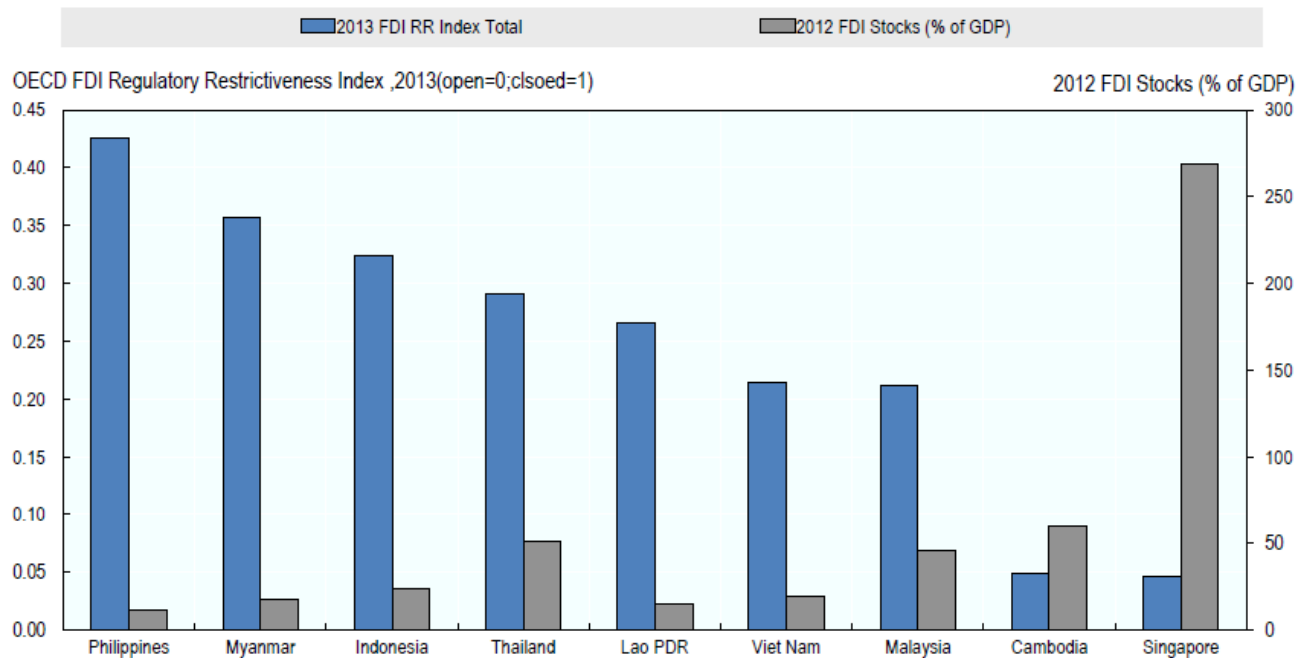


Source: OECD, Southeast Asia Regional Forum; no data for Brunei



# Cambodia and Singapore have the lowest restrictions on FDI

## Sectoral FDI restrictions in ASEAN and OECD members



Source: OECD, Southeast Asia Regional Forum; without Brunei



# Countries with fewer restrictions on FDI have higher FDI ratios to nominal output

FDI Restrictiveness Index scores vs FDI stocks as a share of GDP)



Source: OECD, Southeast Asia Regional Forum; without Brunei



# **Part 2: Liberalising Investment in ASEAN: the ASEAN Comprehensive Investment Agreement (ACIA)**

## **Introduction**





## ACIA's Predecessors

- ACIA as a means to improve on the two earlier ASEAN-wide investment frameworks
  - ASEAN IGA (1987) as investment guarantee agreement among signatory ASEAN Member States.  
Centered on the protection and promotion of investment
  - ASEAN Investment Area Agreement (1998) aimed at establishing a more liberal and transparent investment climate among ASEAN Member States.  
Objective to increase FDI inflows from ASEAN and non-ASEAN sources into ASEAN
- Preservation (no “back-tracking” of commitments) made under the ASEAN IGA and the AIA Agreement



## Scope of Application

- ACIA entered into force on March 29<sup>th</sup> 2012
- ACIA applies to measures adopted or maintained by a Member State relating to
  - Investments in its territory of investors of any other Member State
  - Existing investments at March 29<sup>th</sup> 2012 and investments made after that date
  - Investments admitted according to the laws, regulations and national policies of the host ASEAN Member States (“covered investments”)
- “Measures”
  - Laws, regulations, rules, procedures, decisions, administrative actions
  - Measures adopted or maintained by central, regional or local government or authorities



## Investors

- Natural Person: national citizens or permanent resident of an ASEAN Member State
- Juridical Person: any legal entity constituted under the law of an ASEAN Member State
- ACIA extends its application to investors from outside ASEAN. Such an investor may become an ASEAN Investor by setting up a juridical entity in one of the ASEAN Member States (ASEAN Juridical Person), from which it can then make an investment in another ASEAN Member State
  - Third-country national must own or control the ASEAN Juridical Person (i.e. have power to name a majority of its directors or legally direct its actions)
  - ASEAN Juridical Person must carry out substantive business operations in the ASEAN Member State where it was established



# Excursus

## Regional value chains

- Pillar 1 of the AEC Blueprint 2015: “Single Market and Production Base”
- Today, most products are not made in one single country anymore. Production is increasingly fragmented.
- Each country puts its comparative advantages to optimal use and accommodates particular stages of industrialized production.
- Regional value chains take a substantial role in international production. Intermediate goods trade accounts for roughly 22% of total Asia-Pacific regional trade.
- ACIA as tool to promote regional value chains
  - Investors from third countries build up their ASEAN production networks
  - Investors in ASEAN relocate part of their production in different ASEAN Member States



## Investment

Every kind of asset, owned and controlled by an investor, e.g. (Art. 4)

- Movable and immovable property and property rights (Machinery, factory building, leases, mortgages)
- Shares, stocks, bonds and any other forms of participation in a juridical person
- Intellectual property rights (patents, registered trademarks, geographical indications, industrial designs, copyrights)
- Business concessions required to conduct economic activities, including concessions to search, extract or exploit natural resources
- Amounts yielded by investments, in particular profits, interest, capital gains, dividend, royalties and fees



## Sectoral Application

- ACIA applies in principal to all investments as defined above
- For the purpose of liberalization, ACIA applies only to the following sectors
  - Manufacturing
  - Agriculture
  - Fishery
  - Forestry
  - Mining and quarrying
  - Services incidental to manufacturing, agriculture, fishery, mining and quarrying  
“Services incidental” have their on classification in the Central Product Classification (CPC) and are very specific
- ACIA does not apply to measures adopted by an ASEAN Member State affecting trade in services under AFAS



# **Part 3: Liberalising Investment in ASEAN: the ASEAN Comprehensive Investment Agreement (ACIA)**

## **Pillars 1, 2, and 3: Liberalisation, Facilitation, and Promotion**



## Pillar 1: Measures to enhance Liberalisation under ACIA

National Treatment

Most -Favoured-Nation Treatment pre- and post-establishment

Free choice of Senior Management and Boards of Directors (no nationality requirements)

Freedom to operate without any performance requirement (e.g. production quota or export targets)





## Non-discrimination: National Treatment and MFN

### National Treatment ( Art. 5)

- An investor from ASEAN Member State A in ASEAN Member State B shall be treated in the same way as the local investors in Member State B.
- Subject to reservation in the Schedule

### Most-Favoured Nation (MFN) (Art.6)

- ASEAN Investors should be treated no less favourable than each other or an investor from a 3<sup>rd</sup> country who is not a member of ASEAN.



## The ACIA Schedule: a Single Reservation List

- **Positive listing or reservation** list: countries are only allowed to retain restrictions in specific sectors, listed in the schedule
- Sectors that are not on the list are **by definition open** for investment to ASEAN investors
- AMS mandated to **further liberalize** and reduce restrictions on the list
- **No-backtracking** or derogation of liberalisation committed by AMS
  - 12 months after entry into force of the ACIA, only reduction or elimination of reservations (i.e. further liberalisation) are allowed
  - Modification or withdrawal from ACIA commitments may only be done by negotiation and agreement with any affected Member State (compensation)
  - There are very clear procedures for amendment or modification starting with notification to the Coordinating Committee on Investment and the ASEAN Secretariat.



# The ACIA Schedule: Example from Indonesia's Schedule

## INDONESIA

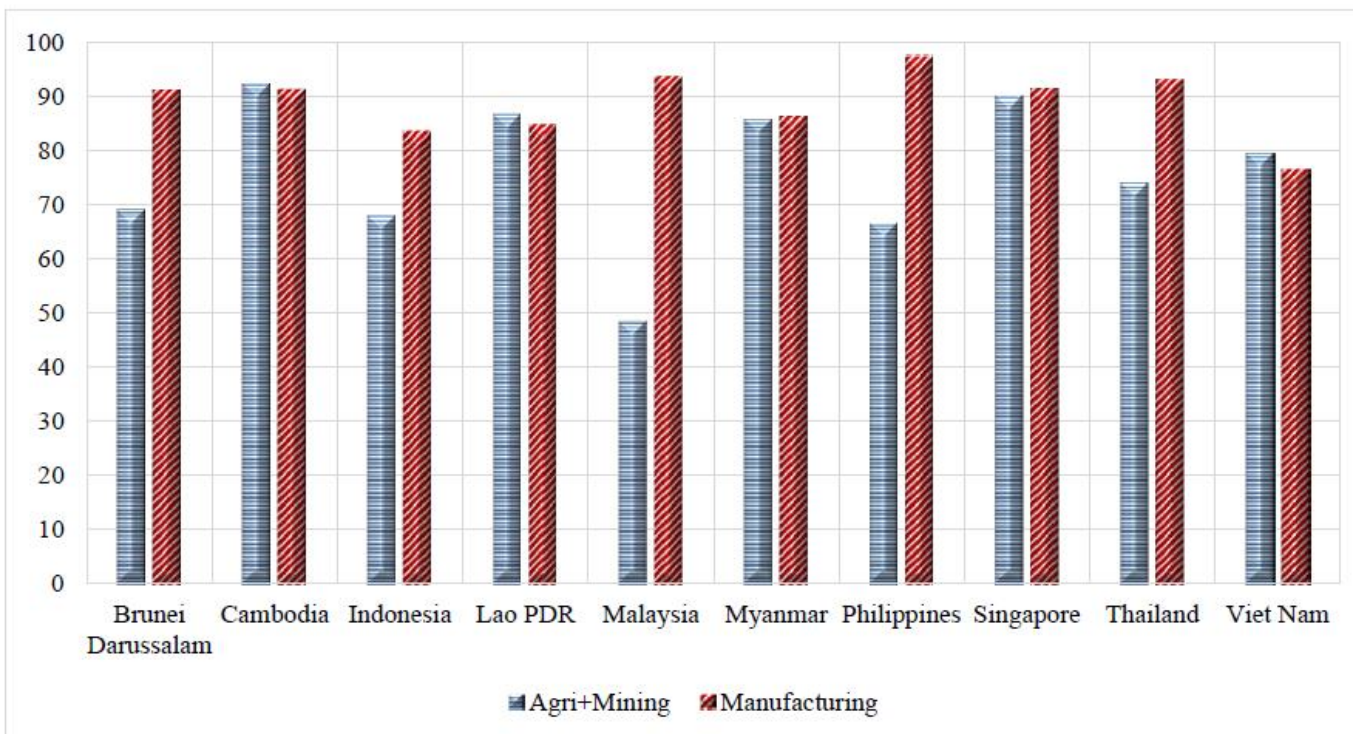
4.

<b>Sector</b>	: All Sectors
<b>Sub-Sector</b>	: -
<b>Industry Classification</b>	: -
<b>Level of Government</b>	: Central
<b>Type of Obligation</b>	: National Treatment
<b>Description of Measure</b>	: Foreign investment <sup>4</sup> shall appoint local distribution agents to sell its products to the end-users in Indonesia.
<b>Source of Measure</b>	: - Government Regulation No. 15 of 1998 Concerning The Termination of Foreign Business Activities in The Trade Sectors - Trade and Industry Minister Decree No. 160/1998 on Amendment of Trade and Industry Minister Decree No. 77 of 1978 on Provision Concerning The Limited Trade Activities for Production Company in the Frame of Capital Investment



In the Schedule, many AMSs are more restrictive in the agriculture and natural resources sector than in manufacturing

**Figure 2: Foreign Investment Liberalization Rate (ACIA, 70% Foreign Equity)**



Source: ERIA, 2015 (<http://www.eria.org/ERIA-DP-2015-32.pdf> )



## Actual investment policies can (and do) differ from the commitments in the ACIA Schedule

**Table 4: Indonesia's Negative Investment List Level of Restrictiveness in Comparison with ACIA Commitments**

No.	Sectors	Less restrictive	Equal	More restrictive	Total number of subsectors
1	Manufacturing	35	28	9	72
2	Services Incidental to Manufacturing	22	3	0	25
3	Agriculture	7	16	2	25
4	Services Incidental to Agriculture	4	0	0	4
5	Forestry	3	8	0	11
6	Services Incidental to Forestry	1	0	0	1
7	Mining and Quarrying	2	2	2	6
8	Services Incidental to Mining and Quarrying	2	1	1	4
9	Fishery	2	2	0	4

Source: Damuri, et al., 2014.

Source: ERIA, 2015 (<http://www.eria.org/ERIA-DP-2015-32.pdf> )



## Pillar 2: Investment Facilitation

More  
transparent,  
consistent and  
predictable  
investment  
rules,  
regulations,  
policies and  
procedures;

Harmonised  
investment  
policies;

Streamlined  
and simplified  
procedures for  
investment  
applications  
and approvals;  
and

Dissemination  
of investment  
information,  
rules,  
regulations,  
policies and  
procedures.



## Measures to enhance facilitation and transparency

### **ASEAN Member States are encouraged to:**

- Streamline and simplify procedures and make them more transparent, consistent and predictable
- Establish one-stop centres for investors
- Establish designated inquiry points for business community and society
- Establish advisory services
- Make publicly available all relevant laws, regulations and administrative guidelines
- Undertake consultation with business community on investment matters

### **ASEAN-wide initiatives:**

- Publication and updating of investment regulations in AMS
- Updating ACIA Focal Points and Investment Promotion Agencies
- Strengthening investment database
- Conducting the ASEAN Investment Forum
- Facilitating Investment Policy Reviews and Workshops on Best Practices



## Pillar 3: Investment Promotion (Art. 24)

- ACIA mandates the joint promotion of ASEAN as an attractive investment area, to enhance production networks & industrial complementation
- Particularly, promotion of investments from ASEAN-6 in the newer ASEAN Member States;
- Activities include
  - Joint website: <http://Investasean.asean.org/>
  - Cross-linking of websites of investment agencies in ASEAN
  - Joint investment missions to develop regional clusters and production networks
  - Briefings and seminars on investment opportunities and investment policies





## **Part 3: Liberalising Investment in ASEAN: the ASEAN Comprehensive Investment Agreement (ACIA)**

### **Pillars 4: Protection and Investor-State Dispute Settlement Mechanism**



## Main Protections

### Fair and Equitable Treatment

- Host ASEAN Member State is bound by the rule of law, when exercising its power, has to make decisions according to its laws and regulations.

Not allowed to make arbitrary decisions.

- If any legal action is taken by the ASEAN Member State against an investor, the investor has the right to defend itself, including through access to legal representatives
- Investor is given the right to appeal any adverse decisions or outcomes



## Main Protections

### Full protection and security

- Host ASEAN Member State has to provide protection and security to an ASEAN Investor's investment
- Protection must be granted at all times, including during riots or insurgence, which may occur in the territory of that ASEAN Member State

### Compensation in cases of strife

- In the event of losses suffered by an investment as a result of armed conflict or similar events, an ASEAN Member State is required to compensate the ASEAN investors that are affected
- Compensation on a non-discriminatory basis



# Main Protections

## Preventing unlawful expropriation

- ASEAN Member State expropriating an investment, either directly or indirectly, is required to provide proper compensation to the affected investor
  - Direct Expropriation:
    - Formal transfer of legal title
    - Outright seizure of the investment of the foreign investor
  - Indirect Expropriation
    - Measure that has a similar effect.
    - Example:
      - Refusal to renew an operating license without a valid reason



# Main Protections

## Preventing unlawful expropriation

- Host ASEAN Member State may only expropriate if it meets the following criteria:
  - Expropriation is undertaken for public purposes
  - Expropriation is done in a non-discriminatory manner
  - Affected investors are provided with prompt, adequate and effective compensation
- Compensation must be equivalent to the fair market value of the expropriated investment



## Main Protections

### Allowing for freedom to transfer funds

- Freely and without delay conduct transfers relating to its investment into and out of the territory of the ASEAN Member State where its investment is located, e.g.
  - Contribution to capital
  - Profits, dividends, royalties, other income from investment
  - Proceeds from total or partial sale or liquidation of an investment
- In exceptional cases, a host ASEAN Member State may prevent or delay transfers of funds through application of laws e.g. with regard to bankruptcy, insolvency or the protection of the rights of creditors
- ASEAN Member State may impose restrictions on any capital transactions as a temporary measure on a non-discriminatory basis e.g. to safeguard balance of payments

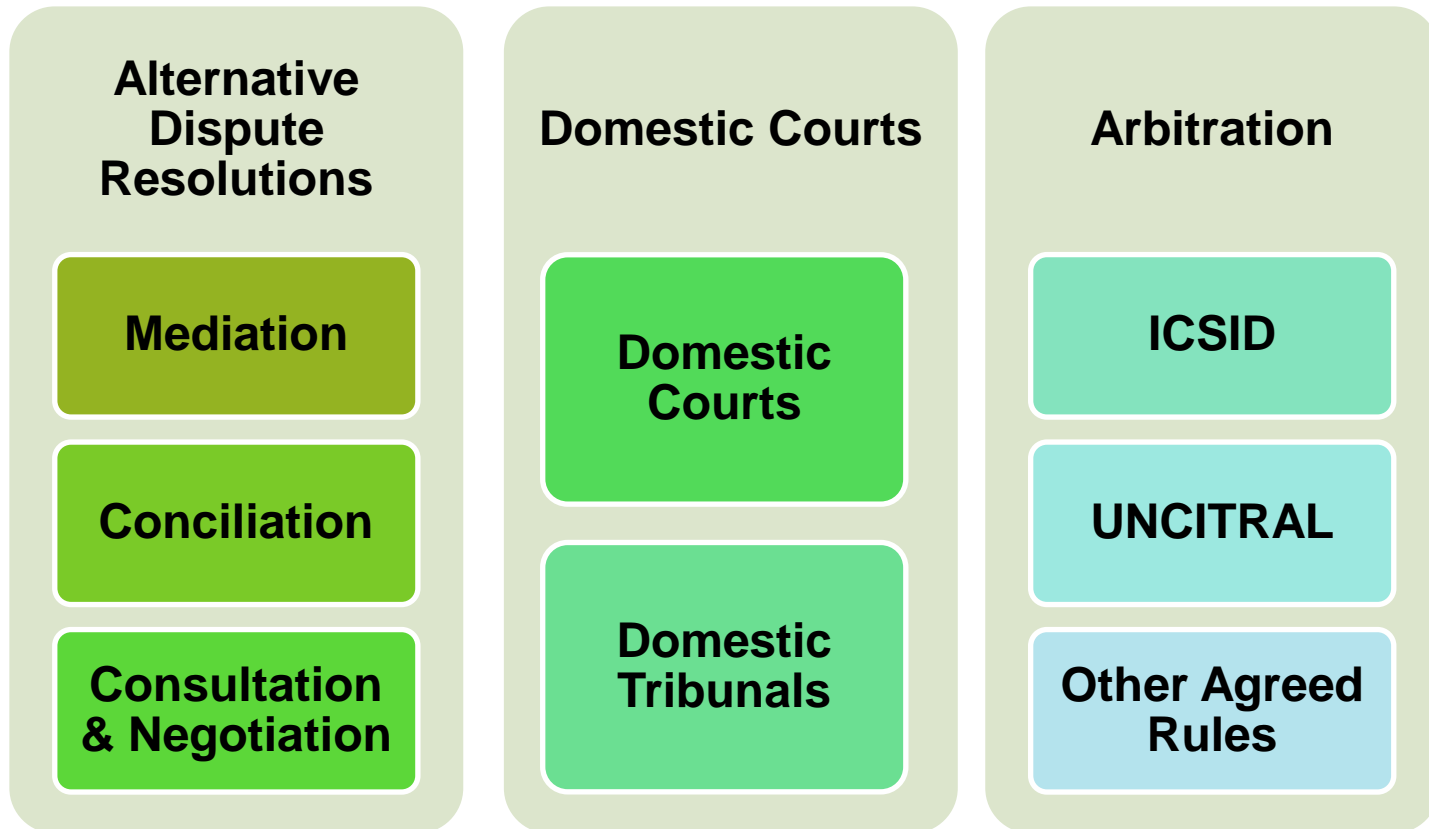


## Access to Dispute Settlement Mechanisms

- Disputing investor has incurred a loss or damage arising out of the breach of the host ASEAN Member State of its obligations under ACIA
- ASEAN Investor may file an action based on the following causes:
  - National Treatment
  - Most-Favoured-Nation Treatment
  - Senior Management and Board of Directors
  - Treatment of Investment
  - Compensation in Cases of Strife
  - Transfer
  - Expropriation and Compensation



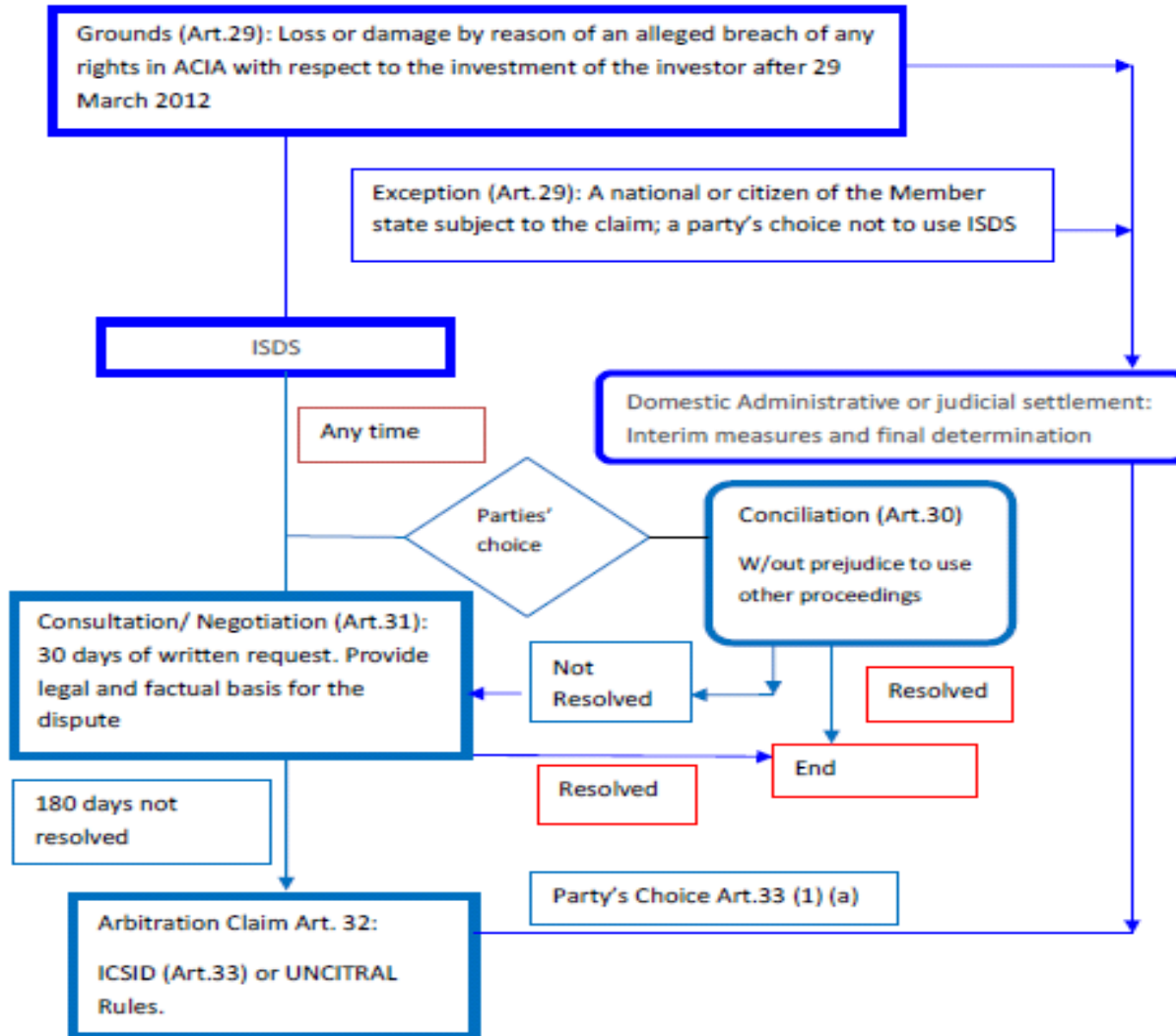
## Fora for Investor-State Dispute Settlement







# ISDS Flow Chart





# Discussion / Case Study



**THANK YOU VERY MUCH!**



## Further Reading

ACIA Schedules for all ASEAN Member States can be found here:

<http://investasean.asean.org/index.php/page/view/asean-free-trade-area-agreements/view/757/newsid/871/the-asean-comprehensive-investment-agreement.html>

A guidebook for businesses is here:

<http://investasean.asean.org/files/upload/ACIA%20guidebook%20Business.pdf>

The most recent ASEAN Investment Report 2015: <http://www.asean.org/asean-investment-report-2015-infrastructure-investment-and-connectivity/>

And an ERIA Study in Investment Liberalisation under ACIA:

<http://www.eria.org/ERIA-DP-2015-32.pdf>