

(สำเนา)

เลขที่รับ ๖๕๐๘/๒๕๕๒ วันที่ ๖ พ.ค. ๒๕๕๒

สำนักงานเลขาธิการสภาผู้แทนราษฎร

ที่ นร ๐๕๐๓/๗๕๙๙

สำนักนายกรัฐมนตรี

ทำเนียบรัฐบาล กทม. ๑๐๓๐๐

๖ พฤษภาคม ๒๕๕๒

เรื่อง ความตกลงว่าด้วยการลงทุนภายใต้กรอบความตกลงว่าด้วยความร่วมมือทางเศรษฐกิจซึ่งครอบคลุม  
ด้านต่าง ๆ ระหว่างรัฐบาลแห่งประเทศสมาชิกสมาคมประชาชาติแห่งเอเชียตะวันออกเฉียงใต้  
และสาธารณรัฐเกาหลี

กราบเรียน ประธานรัฐสภา

สิ่งที่ส่งมาด้วย ความตกลงในเรื่องนี้ และเอกสารประกอบ

ด้วยคณะรัฐมนตรีได้ประชุมปรึกษาลงมติให้เสนอความตกลงว่าด้วยการลงทุนภายใต้กรอบ  
ความตกลงว่าด้วยความร่วมมือทางเศรษฐกิจซึ่งครอบคลุมด้านต่าง ๆ ระหว่างรัฐบาลแห่งประเทศสมาชิก  
สมาคมประชาชาติแห่งเอเชียตะวันออกเฉียงใต้และสาธารณรัฐเกาหลี เพื่อขอความเห็นชอบจากรัฐสภา  
ดังที่ได้ส่งมาพร้อมนี้

จึงขอเสนอความตกลงฯ ดังกล่าว มาเพื่อขอได้โปรดนำเสนอรัฐสภาพิจารณาให้ความเห็นชอบ  
ตามมาตรา ๑๙๐ ของรัฐธรรมนูญแห่งราชอาณาจักรไทยต่อไป

ขอแสดงความนับถืออย่างยิ่ง

(ลงชื่อ)

อภิสิทธิ์ เวชชาชีวะ

(นายอภิสิทธิ์ เวชชาชีวะ)

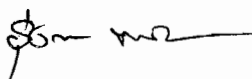
นายกรัฐมนตรี

สำนักเลขาธิการคณะรัฐมนตรี

โทร. ๐ ๒๒๘๐ ๙๐๐๐ ต่อ ๓๐๖

โทรสาร ๐ ๒๒๘๐ ๙๐๕๘

สำเนาถูกต้อง



(นางสาวรุ่งนภา ชันธิโชติ)

ผู้อำนวยการกลุ่มงานระเบียบวาระ

สำนักงานการประชุม

วันนา พิมพ์

วิมล ๓ ทาน

ตรวจ

# สรุปสาระสำคัญของความตกลงว่าด้วยการลงทุนอาเซียนและสาธารณรัฐเกาหลี (ASEAN – Korea Investment Agreement)

## เรื่องเดิม

กรอบความตกลงว่าด้วยความร่วมมือทางเศรษฐกิจที่ครอบคลุมด้านต่างๆ ระหว่างอาเซียนและเกาหลีใต้ (Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea) กำหนดให้ประเทศภาคีเริ่มเจรจาจัดทำความตกลงด้านการลงทุนอาเซียน-เกาหลีใต้ (ASEAN - Korea Investment Agreement) ตั้งแต่กลางปี 2549 เป็นต้นมา การเจรจาจัดทำความตกลงดังกล่าวได้เสร็จสิ้นลง เมื่อวันที่ 8 เมษายน 2552 ณ กรุงเทพฯ ประเทศไทย อนึ่ง ฝ่ายเกาหลีใต้ได้แสดงความประสงค์ที่จะให้มีการลงนามความตกลงดังกล่าวในช่วงระหว่างการประชุมสุดยอดอาเซียน-เกาหลีใต้ สมัยพิเศษ (ASEAN - Korea Commemorative Summit) ระหว่างวันที่ 1-2 มิถุนายน 2552 ณ เกาะเจจู สาธารณรัฐเกาหลี โดยจะมีรัฐมนตรีเศรษฐกิจอาเซียนและเกาหลีใต้ร่วมลงนามระหว่างกันเพื่อเฉลิมฉลองความสัมพันธ์ครบ 20 ปี

## ผู้เข้าร่วมการเจรจา

คณะผู้แทนไทยที่เข้าร่วมการเจรจาในกลุ่มลงทุนประกอบด้วยผู้แทนจากส่วนราชการที่เกี่ยวข้อง ได้แก่ สำนักงานคณะกรรมการส่งเสริมการลงทุน กรมเศรษฐกิจระหว่างประเทศ ธนาคารแห่งประเทศไทย สำนักงานเศรษฐกิจการคลัง กรมสนธิสัญญาและกฎหมาย และกรมเจรจาการค้าระหว่างประเทศ

## สาระสำคัญของความตกลง

ความตกลงว่าด้วยการลงทุนอาเซียน-เกาหลีใต้ มีพันธกรณีหลักที่สำคัญสรุปได้ ดังนี้

(1) พันธกรณีของความตกลงฯ แบ่งออกเป็น 2 หลักใหญ่ คือ การเปิดเสรี และการคุ้มครองการลงทุน โดยครอบคลุมทั้งการลงทุนทางตรง (Foreign Direct Investment: FDI) และการลงทุนในหลักทรัพย์ (Portfolio Investment)

(2) ขอบเขตของการเปิดเสรีครอบคลุมธุรกิจ 5 ภาค ได้แก่ เกษตร ประมง ป่าไม้ เหมืองแร่ และภาคการผลิต ส่วนการให้ความคุ้มครอง นั้น รวมถึงการลงทุนทั้ง 5 ภาคข้างต้นและในธุรกิจบริการภายใต้กรอบความตกลงด้านการค้าบริการอาเซียน-เกาหลีใต้ (Agreement on Trade in Services among ASEAN and South Korea: AKTIS) ด้วย

(3) แนวทางการเปิดเสรีใช้ Negative List Approach โดยพันธกรณีหลัก คือ การให้การปฏิบัติเยี่ยงคนชาติ (National Treatment) และการปฏิบัติเยี่ยงชาติที่ได้รับความอนุเคราะห์ยิ่ง (Most-favoured-nation Treatment) และเงื่อนไขการดำรงตำแหน่งผู้บริหารอาวุโสและคณะกรรมการ (Senior Management and Board of Directors) เป็นต้น อย่างไรก็ตาม อาเซียนและเกาหลีใต้ยังไม่ต้องจัดทำตารางข้อสงวนเมื่อความตกลงนี้มีผลใช้บังคับ โดยจะจัดทำเป็นแผนงาน (Work Programme) ซึ่งทั้งสองฝ่ายตกลงกันที่จะจัดทำตารางข้อสงวนภายใน 5 ปี นับจากวันที่ความตกลงนี้มีผลใช้บังคับ ซึ่งหมายความว่า ไทยยังไม่ได้เปิดเสรีภายใต้ความตกลงนี้ จนกว่าจะสรุปแผนงานได้

(4) การคุ้มครองการลงทุนในความตกลงนี้ ประกอบด้วย การปฏิบัติที่เป็นธรรม การชดเชย ในกรณีเกิดเหตุการณ์ไม่สงบ การชดเชยในกรณีที่มีการเวนคืน การระงับข้อพิพาทระหว่างรัฐ การระงับข้อพิพาทระหว่างรัฐกับนักลงทุน การอนุญาตให้มีการโอนผลกำไรที่ได้จากการลงทุนกลับประเทศได้ เป็นต้น

(5) ประเด็นอื่นๆ ได้แก่ ประเด็นที่ไทยผลักดันให้รัฐสามารถดำเนินมาตรการเพื่อปกป้องเสถียรภาพทางการเงินและอัตราแลกเปลี่ยน

### **ประโยชน์ของความตกลงด้านการลงทุนอาเซียน - เกาหลีใต้**

เพื่อสนับสนุนความสามารถในการแข่งขันของอาเซียนในการดึงดูดการลงทุนโดยตรงจากเกาหลีใต้ และการลงทุนระหว่างกันในอาเซียน ซึ่งจะนำไปสู่การไหลเข้าของเงินลงทุนใหม่และการนำผลกำไรกลับมาลงทุนใหม่แบบยั่งยืน

### **ความเห็นกระทรวงพาณิชย์**

ความตกลงว่าด้วยการลงทุนอาเซียน-เกาหลีใต้เป็นส่วนหนึ่งของกรอบความตกลงความร่วมมือทางเศรษฐกิจที่ครอบคลุมด้านต่างๆ ระหว่างอาเซียนและเกาหลีใต้ ซึ่งเป็นส่วนหนึ่งของความสัมพันธ์ด้านการค้าและการลงทุนระหว่างอาเซียนและเกาหลีใต้ สาระของความตกลงมีส่วนช่วยเสริมสร้างความเชื่อมั่นให้นักลงทุน อันจะนำมาซึ่งการดึงดูดการลงทุนระหว่างกัน สำหรับประเทศไทยนอกจากจะได้ประโยชน์จากการลงทุนของนักลงทุนต่างชาติแล้ว คนไทยที่ไปลงทุนในเกาหลีใต้จะได้รับความเชื่อมั่นในการคุ้มครองการลงทุนของคนไทยมากขึ้นด้วย

กรมเจรจาการค้าระหว่างประเทศ  
กระทรวงพาณิชย์  
พฤษภาคม 2552

**AGREEMENT ON INVESTMENT UNDER THE FRAMEWORK  
AGREEMENT ON COMPREHENSIVE ECONOMIC COOPERATION AMONG THE  
GOVERNMENTS OF THE MEMBER COUNTRIES OF THE ASSOCIATION OF  
SOUTHEAST ASIAN NATIONS AND THE REPUBLIC OF KOREA**

The Governments of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam, Member States of the Association of Southeast Asian Nations, and the Republic of Korea,

**RECALLING** the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea (Framework Agreement) signed in Kuala Lumpur, Malaysia on the 13<sup>th</sup> day of December 2005;

**FURTHER RECALLING** Articles 1.3 and 2.3 of the Framework Agreement, which reflect their commitment to establish the ASEAN-Korea Free Trade Area covering investment;

**REAFFIRMING** their commitment to create a liberal, facilitative, transparent and competitive investment regime with business-friendly environment among the ASEAN Member States and the Republic of Korea, and to provide protection for investors of the Parties and their investments under the investment regime;

**RECOGNISING** that mutually enhanced investment opportunities will stimulate the flow of private capital and the economic development among the ASEAN Member States and the Republic of Korea; and

**NOTING** the different stages of economic development among the ASEAN Member States and the need for flexibility to be given to the new ASEAN Member States, in particular the need to facilitate their increasing participation in the economic cooperation of the Parties and the expansion of their exports, including, *inter alia*, through strengthening their domestic capacity, efficiency and competitiveness,

**HAVE AGREED** as follows:

## **Article 1**

### **Definitions**

For the purposes of this Agreement;

- (a) **ASEAN Member State** means Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand or the Socialist Republic of Viet Nam individually;
- (b) **ASEAN Member States** means Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam collectively;
- (c) **covered investment** means, with respect to a Party, an investment in its territory of an investor of any other Party, in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and has been admitted according to its laws, regulations and national policies, and where applicable, specifically approved in writing<sup>1</sup> by its competent authority;
- (d) **disputing parties** means a disputing investor and a disputing Party;
- (e) **disputing Party** means a Party against which a claim is made under Article 18 (Investment Dispute Settlement between a Party and an Investor of any other Party);
- (f) **Framework Agreement** means the Framework Agreement on Comprehensive Economic Cooperation among the Republic of Korea and the Governments of the Member Countries of the Association of Southeast Asian Nations;
- (g) **freely usable currency** means any currency designated as such by the International Monetary Fund (IMF) under its Articles of Agreement and any amendments thereto;

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<sup>1</sup> For the purpose of protection, the procedures relating to specific approval in writing shall be in Annex 1 (Approval in Writing).

- (h) **GATS** means the General Agreement on Trade in Services, contained in Annex 1B to the WTO Agreement;
- (i) **Implementing Committee** means the Implementing Committee established under Article 5.3 of the Framework Agreement;
- (j) **investment** means every kind of asset that an investor owns or controls, and that has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gains or profits or the assumption of risk, and in particular, shall include but is not limited to:
  - (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
  - (ii) shares, stocks and debentures of a juridical person or interests in the property of such juridical person;
  - (iii) intellectual property rights which are recognised pursuant to laws and regulations of a host Party and international agreements to which the host Party is a party and goodwill;
  - (iv) business concessions<sup>2</sup> conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources; and
  - (v) a claim to money or any performance having financial value,

but the term **investment** does not include claims to money that arise solely from:

- (i) commercial contracts for the sale of goods or services by a natural or juridical person in the territory of a Party to natural or juridical person in the territory of any other Party; or

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<sup>2</sup> Business concessions include contractual rights such as those under turnkey, construction, management, production or revenue-sharing, concessions, or other similar contracts and may include investment funds for projects such as Build-Operate and Transfer (BOT) and Build-Operate and Own Schemes (BOO).

- (ii) the extension of credit in connection with a commercial transaction, such as trade financing.

For the purpose of the definition of investment in this Article, returns that are invested should be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments;

- (k) **investor of a Party** means a natural person or a juridical person of a Party that is seeking to make<sup>3</sup>, is making, or has made an investment in the territory of any other Party;
- (l) **juridical person of a Party** means any legal entity duly constituted or otherwise organized under a Party's applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association, and its branch<sup>4</sup>;
- (m) **Korea** means the Republic of Korea;
- (n) **measures** means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or in any other form affecting investors and/or investments, and include measures taken by:
  - (i) central, regional or local governments and authorities; and
  - (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments and authorities;

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<sup>3</sup> For greater certainty, the Parties understand that an investor that "is seeking to make" an investment refers to an investor of any other Party that has taken active steps to initiate a notification or approval process, where applicable, for making an investment.

<sup>4</sup> For greater certainty, a branch of a legal entity of a non-Party shall not be considered as a juridical person of a Party.

- (o) **natural person of a Party**<sup>5</sup> means any natural person possessing the nationality or citizenship of or right of permanent residence in that Party in accordance with its laws and regulations;
- (p) **new ASEAN Member States** means the Kingdom of Cambodia, the Lao People's Democratic Republic, the Union of Myanmar and the Socialist Republic of Viet Nam;
- (q) **non-disputing Party** means the Party of the disputing investor;
- (r) **Parties** means the ASEAN Member States and Korea collectively;
- (s) **Party** means an ASEAN Member State or Korea;
- (t) **returns** means amounts yielded by or derived from an investment particularly, though not exclusively, any profits, interests, capital gains, dividends, royalties or fees;
- (u) **WTO** means the World Trade Organisation; and
- (v) **WTO Agreement** means the Marrakesh Agreement Establishing the World Trade Organisation, done at Marrakesh on the 15th day of April 1994 and the other agreements negotiated thereunder.

## **Article 2**

### **Scope and Coverage**

1. This Agreement shall apply to measures adopted or maintained by a Party relating to:
  - (a) investors of any other Party; and
  - (b) covered investments;

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<sup>5</sup> In the case of a Party who does not grant rights of permanent residence to foreigners or accord its permanent residents the same benefits as its nationals or citizens, it shall not be legally obliged to accord the benefits of this Agreement to permanent residents of any other Party or claim the aforesaid benefits for its permanent residents, if applicable, from any other Party.



2. This Agreement does not apply to:
- (a) government procurement;
  - (b) subsidies or grants provided by a Party;
  - (c) any taxation measure, except under Article 10 (Transfers) and Article 12 (Expropriation and Compensation);
  - (d) claims arising out of events which occurred, or claims which had been raised, prior to the entry into force of this Agreement;
  - (e) services supplied in the exercise of governmental authority such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, provided that such services are supplied neither on a commercial basis, nor in competition with one or more service suppliers; or
  - (f) measures adopted or maintained by a Party to the extent that they are covered by the Agreement on Trade in Services under the Framework Agreement.

3. Notwithstanding paragraph 2(f) of this Article, Article 5 (General Treatment of Investment), Article 10 (Transfer), Article 12 (Expropriation and Compensation), Article 13 (Compensation for Losses), Article 14 (Subrogation), and Article 18 (Investment Dispute Settlement between a Party and an Investor of any other Party) of this Agreement shall apply, *mutatis mutandis*, to any measure affecting the supply of service by a service supplier of a Party through commercial presence<sup>6</sup> in the territory of any other Party pursuant to the provisions of the Agreement on Trade in Services under the Framework Agreement, only to the extent that they relate to a covered investment.

### **Article 3**

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<sup>6</sup> Commercial presence shall have the same meaning as that in the Agreement on Trade in Services under the Framework Agreement.

## **National Treatment<sup>7</sup>**

Each Party shall accord to investors of any other Party, and to covered investments of investors of any other Party, treatment no less favourable than that it accords through its measures, in like circumstances, to its own investors and investments with respect to admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

## **Article 4** **Most-Favoured-Nation Treatment<sup>8</sup>**

1. Each Party shall accord to investors of any other Party treatment no less favourable than it accords, in like circumstances, to investors of any other Party or a non-Party with respect to admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than it accords, in like circumstances, to investments in its territory of investors of any other Party or a non-Party with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

3. The treatment, as set forth in paragraphs 1 and 2, shall not include:

- (a) any preferential treatment accorded to investors and/or their investments under any existing bilateral, regional and/or international agreements or any forms of economic or regional cooperation with any non-Party; and
- (b) any existing or future preferential treatment accorded to investors and/or their investments in any agreement or arrangement between or among ASEAN Member States.

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<sup>7</sup> The application of this Article is subject to Article 27 (Work Programme).

<sup>8</sup> The application of this Article is subject to Article 27 (Work Programme).

4. Notwithstanding paragraphs 1 and 2, if a Party accords more favourable treatment to investors of any other Party or a non-Party or their investments by virtue of any future agreements or arrangements to which the Party is a party, it shall not be obliged to accord such treatment to investors of any other Party or their investments. However, upon request from any other Party, it shall accord adequate opportunity to negotiate the benefits granted therein.

## **Article 5**

### **General Treatment of Investment**

1. Each Party shall accord to covered investments of investors of any other Party fair and equitable treatment and full protection and security.

2. For greater certainty:

- (a) fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings;
- (b) full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments; and
- (c) the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is provided under the customary international law and do not create additional substantive rights.<sup>9</sup>

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

## **Article 6**

### **Performance Requirements<sup>10</sup>**

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<sup>9</sup> In the case of the Republic of Indonesia, paragraph 2(c) does not apply.

<sup>10</sup> The application of this Article is subject to Article 27 (Work Programme).

The provisions of the WTO Agreement on Trade-related Investments Measures (TRIMs), which are not specifically mentioned in or modified by this Agreement, shall apply, *mutatis mutandis*, to this Agreement unless the context otherwise requires.

**Article 7**  
**Senior Management and Boards of Directors<sup>11</sup>**

1. A Party shall not require a juridical person of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.
2. A Party may require that a majority of the board of directors, or any committee thereof, of a juridical person of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

**Article 8**  
**Transparency**

1. Each Party shall promptly publish, or otherwise make publicly available, its laws, regulations, administrative rulings and judicial decisions of general application as well as international agreements which pertain to or affect any matter covered by this Agreement.
2. Each Party shall promptly make publicly available any new laws or any changes to existing laws, regulations or administrative guidelines which significantly affect investments or commitments of a Party under this Agreement.
3. The provisions of paragraphs 1 and 2 shall not be construed so as to oblige a Party to disclose confidential information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or which would prejudice privacy or legitimate commercial interests.

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<sup>11</sup> The application of this Article is subject to Article 27 (Work Programme).

4. Each Party shall establish or designate an enquiry point where, upon request of any natural person, juridical person or any other Party, all information relating to the measures required to be published or made available under paragraphs 1 and 2 may be promptly obtained.

5. Each Party shall notify all the other Parties through the Implementing Committee at least once annually of any future investment related agreement or arrangement which grants any preferential treatment and to which it is a party.

6. All notifications and communications pursuant to paragraphs 4 and 5 shall be in the English language.

### **Article 9**

#### **Reservations<sup>12</sup>**

1. Article 3 (National Treatment), Article 4 (Most-Favoured-Nation Treatment), Article 7 (Senior Management and Boards of Directors), and in the case of the Lao People's Democratic Republic Article 6 (Performance Requirements), shall not apply to:

- (a) any existing non-conforming measure that is maintained by a Party at:
  - (i) the central level of government as set out by the Party in its Schedule of Reservations in List 1;
  - (ii) the regional level of government as set out by the Party in its Schedule of Reservations in List 1; or
  - (iii) the local level of government.
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed at the date of entry into

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<sup>12</sup> The application of this Article is subject to Article 27 (Work Programme).

force of the Party's Schedule of Reservations in List 1, with Article 3 (National Treatment), Article 4 (Most-Favoured-Nation Treatment), Article 7 (Senior Management and Boards of Directors), and in the case of the Lao People's Democratic Republic Article 6 (Performance Requirements).

2. Article 3 (National Treatment), Article 4 (Most-Favoured-Nation Treatment), Article 7 (Senior Management and Boards of Directors), and in the case of the Lao People's Democratic Republic Article 6 (Performance Requirements), shall not apply to any reservation for measures that a Party adopts or maintains with respect to sectors, sub-sectors or activities, as set out in List 2 .

3. Other than pursuant to any procedures for the modification of Schedules of Reservations, a Party may not, under any measure adopted after the date of entry into force of this Agreement and covered by List 2, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Procedures for the modification of the Schedules of Reservations referred to in paragraph 3 are to be pursuant to Article 27 (Work Programme).

5. Nothing in this Agreement shall be construed so as to derogate from rights and obligations under international agreements in respect of protection of intellectual property rights to which the Parties are party, including the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and other treaties concluded under the auspices of the World Intellectual Property Organization.

## **Article 10**

### **Transfers**

1. Each Party shall allow transfers relating to a covered investment to be made freely and without delay into and out of its territory in any freely usable currency at the prevailing market rate of exchange in its territory on the date of transfer. Such transfers shall include:

- (a) the initial capital and additional amounts to maintain or increase the investment;

- (b) profits, dividends, interest, capital gains, royalty payments, licence fees, technical assistance fees, management fees and other current income accruing from any covered investment;
  - (c) proceeds from the sale or liquidation of all or any part of the investment;
  - (d) payments made under a contract including payments made pursuant to a loan agreement;
  - (e) payments made in accordance with Article 12 (Expropriation and Compensation) and Article 13 (Compensation for Losses); and
  - (f) payments arising out of the settlement of a dispute under this Agreement.
2. Notwithstanding paragraph 1, a Party may delay or prevent a transfer through the equitable, non-discriminatory and good faith application of its laws and regulations relating to:
- (a) bankruptcy, insolvency or the protection of the rights of creditors;
  - (b) issuing, trading or dealing in securities, futures, options or derivatives;
  - (c) criminal or penal offences;
  - (d) social security, public retirement or compulsory savings scheme;
  - (e) ensuring compliance with the judgments in judicial or administrative proceedings;
  - (f) severance entitlement of employees;
  - (g) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; and
  - (h) taxation.

3. Nothing in this Agreement shall affect the rights and obligations of the Parties as members of the International Monetary Fund (IMF) under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article 11 (Temporary Safeguard Measures) or at the request of the Fund.

### **Article 11**

#### **Temporary Safeguard Measures**

1. A Party may adopt or maintain measures not conforming with its obligations under Article 3 (National Treatment) relating to cross-border capital transactions or Article 10 (Transfers) in the event of serious balance of payments and external financial difficulties or under threat thereof.

2. A Party may adopt or maintain measures not conforming with its obligations under Article 10 (Transfers) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious economic or financial disturbance or serious difficulties for the operation of monetary or exchange rate policies in the Party concerned.<sup>13</sup>

3. The measures referred to in paragraphs 1 and 2 shall:

- (a) be consistent with the Articles of Agreement of the IMF, as may be amended;
- (b) avoid unnecessary damage to the commercial, economic and financial interests of any other Party;
- (c) not exceed those necessary to deal with the circumstances described in paragraph 1 or 2;
- (d) be temporary and phased out progressively as the situation specified

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<sup>13</sup> For greater certainty, any measures taken to ensure the stability of the exchange rate including to prevent speculative capital flows shall not be adopted or maintained for the purpose of protecting a particular sector.



in paragraph 1 improves; and

- (e) be applied such that any one of the other Parties is treated no less favourably than any other Party or non-Party.

4. Measures adopted or maintained pursuant to paragraph 2 shall, in addition to paragraphs 3(a) to (e):

- (a) be phased out within one year or when conditions would no longer justify their institution or maintenance<sup>14</sup>;
- (b) be applied on a national treatment basis; and
- (c) avoid unnecessary damage to investors and covered investments of any other Party.

5. Any restrictions adopted or maintained under paragraphs 1 and 2 or any changes therein, shall be promptly notified to the other Parties.

## **Article 12**

### **Expropriation and Compensation**

1. A Party shall not nationalise or expropriate covered investments of an investor of any other Party, either directly or through measures equivalent to expropriation or nationalisation (referred hereto as "expropriation"), except:

- (a) for public purpose<sup>15</sup>;
- (b) in accordance with due process of law;
- (c) on a non-discriminatory basis; and

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<sup>14</sup> For greater certainty, the measures may be extended beyond the one year period should conditions warrant.

<sup>15</sup> For the avoidance of doubt, where Malaysia is the expropriating Party, any measure of expropriation relating to land shall be for the purposes as set out in the domestic laws and regulations relating to land acquisition.

(d) upon payment of prompt, adequate and effective compensation.

2. For the purpose of paragraph 1(d), compensation shall:

(a) be equivalent to the fair market value of the expropriated investment at the time when the expropriation was publicly announced<sup>16</sup>, or when the expropriation occurred, whichever is applicable;

(b) not reflect any change in value occurring because the intended expropriation had become known earlier;

(c) be settled and paid without undue delay<sup>17</sup>; and

(d) be effectively realisable and freely transferable between the territories of the Parties.

3. The compensation referred to in paragraph 1(d) shall include appropriate interest. The compensation, including any accrued interest, shall be payable either in the currency of the expropriating Party, or if requested by the investor, in a freely usable currency.

4. Notwithstanding paragraphs 1, 2 and 3, in the case of the Republic of Singapore and the Socialist Republic of Viet Nam, any measure of expropriation relating to land shall be as defined in their respective domestic laws, regulations and any amendment thereto and shall be, for the purposes of and upon payment of compensation, in accordance with the aforesaid laws and regulations.

5. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights under the TRIPS Agreement.

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<sup>16</sup> In the case of the Republic of the Philippines, the time when or immediately before the expropriation was publicly announced refers to the date of filing of the Petition for Expropriation.

<sup>17</sup> The Parties understand that there may be legal and administrative processes that need to be observed before payment can be made.

### **Article 13**

#### **Compensation for Losses**

A Party shall accord to investors of any other Party whose covered investment suffered losses due to war or other armed conflict, state of national emergency, civil strife or other similar events in its territory, treatment no less favourable than that accorded, in like circumstances, to its own investors or investors of a non-Party whichever is more favourable, relating to restitution, indemnification, compensation or any other forms of settlement.

### **Article 14**

#### **Subrogation**

1. Where a Party or an agency authorised by that Party has granted a contract of insurance or any form of financial guarantee against non-commercial risks with regard to a covered investment by one of its investors in the territory of any other Party and when payment has been made under this contract or financial guarantee by the former Party or the agency authorised by it, the latter Party shall recognise the rights of the former Party or the agency authorised by the Party by virtue of the principle of subrogation to the rights of the investor.<sup>18</sup>

2. Where a Party or the agency authorised by the Party has made a payment to its investor and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Party or the agency authorised by the Party, making the payment,<sup>19</sup> pursue those rights and claims against the other Party.

### **Article 15**

#### **Special Formalities and Treatment of Information**

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<sup>18</sup> For greater certainty, the subrogated or transferred right or claim shall not be greater than the original right or claim of the investor.

<sup>19</sup> For greater certainty, Article 10 (Transfers), Article 12 (Expropriation and Compensation) and Article 13 (Compensation for Losses) shall apply *mutatis mutandis* as regards payment to be made to the Party or the agency prescribed in paragraphs 1 and 2 by virtue of such recognition of rights and claims, and the transfer of such payment.

1. Nothing in Article 3 (National Treatment) shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of any other Party, such as the requirement that investments be legally constituted under the laws or regulations of the Party and compliance with registration requirements, provided that such formalities do not materially impair the rights afforded by a Party to investors of any other Party and investments of investors of any other Party pursuant to this Agreement.

2. Notwithstanding Article 3 (National Treatment) or Article 4 (Most-Favoured-Nation Treatment), a Party may require an investor of any other Party, or its investment in its territory, to provide routine information concerning that investment solely for information or statistical purposes. The Party shall protect any confidential information which has been provided from any disclosure that would prejudice legitimate commercial interests of particular juridical persons, public or private or the competitive position of the investor or the investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

## **Article 16**

### **Special and Differential Treatment for the new ASEAN Member States**

In order to increase benefit for the new ASEAN Member States in participating in this Agreement, and in accordance with the objectives set out in the Preamble to this Agreement and in the Framework Agreement, a special and differential treatment shall be accorded to these States, to the extent possible, through:

- (a) access to information on the investment policies of other Parties, business information, relevant databases and contact point for investment promotion;
- (b) technical assistance to strengthen their capacity in relation to investment policies and promotion including in areas such as human resource development;
- (c) commitments in areas of interest to the new ASEAN Member States; and

- (d) recognising that commitments by each new ASEAN Member State can be made in line with its respective development policies and strategies.

## **Article 17**

### **Denial of Benefits**

1. A Party may deny the benefits of this Agreement to an investor of any other Party that is a juridical person of such other Party and to investments of such investor if the juridical person has no substantial business activities in the territory of the Party under whose law it is constituted or organised, and investors of a non-Party, or of the denying Party, own or control the juridical person.
2. The denying Party shall, to the extent practicable, notify the other Parties concerned before denying the benefits. If the denying Party provides such notice, it shall consult with the other Parties concerned at the request of such other Parties.
3. Notwithstanding paragraph 1, and subject to prior notification to and consultation with the relevant Party, in the case of the Kingdom of Thailand, the Kingdom of Thailand may deny the benefits of this Agreement relating to the admission, establishment, acquisition and expansion of investments to an investor of any other Party that is a juridical person of such other Party and to investments of such an investor where the Kingdom of Thailand establishes that the juridical person is owned or controlled by natural persons or juridical persons of a non-Party.
4. In the case of the Kingdom of Thailand, a juridical person is:
  - (a) **owned** by investors of a Party if more than 50 per cent of the equity interest in it is beneficially owned by such investors; and
  - (b) **controlled** by investors of a Party if such investors have the power to name a majority of its directors or otherwise to legally direct its actions.
5. Following notification, and without prejudice to paragraph 1, in the case of the Republic of the Philippines, the Republic of the Philippines may deny the benefits of this Agreement to an investor of any other Party and to investments of that investor, where it establishes that such investor has made an investment in breach of the

provisions of Commonwealth Act No. 108 (An Act to Punish Acts of Evasion of Laws on the Nationalization of Certain Rights, Franchises or Privileges) as amended by Presidential Decree No. 715, otherwise known as "the Anti-Dummy Law", as may be amended.

**Article 18**  
**Investment Dispute Settlement**  
**between a Party and an Investor of any other Party**

1. This Article shall apply to investment disputes between a Party and an investor of any other Party concerning an alleged breach of Article 3 (National Treatment), Article 4 (Most-Favoured-Nation Treatment), Article 5 (General Treatment of Investment), Article 7 (Senior Management and Boards of Directors), Article 10 (Transfers), Article 12 (Expropriation and Compensation) and Article 13 (Compensation for Losses) of this Agreement which causes loss or damage by reason of, or arising out of, that breach to:

- (a) the investor in relation to its covered investments; or
- (b) the covered investment that has been made by that investor,

relating to the management, conduct, operation or sale or other disposition of a covered investment.

2. A natural person possessing the nationality or citizenship of a Party shall not pursue a claim against that Party under this Agreement.

3. An investment may not make a claim under this Article.

4. In the event of an investment dispute arising under this Article, the disputing parties shall as far as possible resolve the dispute through consultation and negotiation, a request of which shall be made in writing, with a view towards reaching an amicable settlement.

5. Any such dispute which has not been resolved within a period of six months from the date of written request for consultations may be submitted to the courts or administrative tribunals of the disputing Party provided that such courts or tribunals

have jurisdictions over such claims or to arbitration. In the latter event, the investor has the choice among any of the following:

- (a) the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the disputing Party and the non-disputing Party are parties to the ICSID Convention<sup>20</sup>;
- (b) the ICSID Additional Facility Rules, provided that either the disputing Party or the non-disputing Party is a party to the ICSID Convention;
- (c) the UNCITRAL Arbitration Rules; or
- (d) any other arbitration institution or any other arbitration rules, if the disputing parties so agree.

6. Once the investor has submitted the dispute to the courts or administrative tribunals of the disputing Party or any of the arbitration mechanisms provided for in paragraph 5, the choice of forum shall be final.

7. The submission of a dispute to arbitration under paragraph 5 shall be conditional upon:

- (a) the submission of the dispute to such arbitration taking place within three years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Agreement and, of the loss or damage incurred by the disputing investor in relation to its covered investment or by the covered investment; and
- (b) the disputing investor providing written notice, which shall be delivered at least 90 days before the claim to arbitration is submitted, to the disputing Party of its intent to submit the dispute to such arbitration and which:

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<sup>20</sup> In the case of the Republic of the Philippines, submission of a claim under the *ICSID Convention* and the *ICSID Rules of Procedure for Arbitration Proceedings* shall be subject to a written agreement between the disputing parties in the event that an investment dispute arises. For greater certainty, nothing in this Agreement shall be construed to derogate from the written agreement requirement set out in this footnote.

- (i) nominates one of the fora in paragraph 5(a), (b), (c), or (d) as the forum for dispute settlement; and
- (ii) briefly summarises the alleged breach of the disputing Party under this Agreement (including the articles alleged to have been breached) and the loss or damage allegedly caused to the investor in relation to its covered investment or caused to the covered investment.<sup>21</sup>

8. Where an investment dispute relate to a measure which may be a taxation measure, the disputing Party and the non-disputing Party, including representatives of their tax administrations, shall hold consultations to determine whether the measure in question is a taxation measure.

9. Where a disputing investor claims that the disputing Party has breached Article 12 (Expropriation and Compensation) by the adoption or enforcement of a taxation measure, the disputing Party and the non-disputing Party shall, upon request from the disputing Party, hold consultations with a view to determining whether the taxation measure in question has an effect equivalent to expropriation or nationalisation.

10. Any tribunal that may be established under this Article shall accord serious consideration to the decision of the disputing Party and the non-disputing Party under paragraphs 8 and 9.

11. If the disputing Party and the non-disputing Party fail either to initiate such consultations referred to in paragraphs 8 and 9, or to make such joint decisions, within the period of 180 days from the date of the receipt of request for consultation referred to in paragraph 4, the disputing investor shall not be prevented from submitting its claim to arbitration in accordance with this Article.

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<sup>21</sup> In the event of an investment dispute between Korea and an investor of any other Party or between any other Party and an investor of Korea, it shall be considered that the disputing Party consents to the submission of the dispute to the arbitration forum selected by the disputing investor, provided that Korea and that other Party had consented to submission of investment disputes to that forum in existing bilateral agreements to which both Korea and that other Party are parties.



12. A Party shall not prevent the disputing investor from seeking interim measures of protection, not involving the payment of damages or resolution of the substance of the matter in dispute before the courts or administrative tribunals of the disputing Party, prior to the institution of proceedings before any of the dispute settlement fora referred to in paragraph 5, for the preservation of its rights and interests.

13. A Party shall not give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and any other Party shall have consented to submit or have submitted to arbitration under this Article, unless such other Party has failed to abide by and comply with the award rendered in such dispute. Diplomatic protection, for the purposes of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

14. An award made by a tribunal shall be final and binding upon the disputing parties. An award shall have no binding force except between the disputing parties and in respect of the particular case.

## **Article 19**

### **Disputes between the Parties**

Unless otherwise provided in this Agreement, any dispute concerning the interpretation, implementation or application of this Agreement shall be resolved through the procedures and mechanism as set out in the Agreement on Dispute Settlement Mechanism under the Framework Agreement.

## **Article 20**

### **General Exceptions**

1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties or their investors where like conditions prevail, or a disguised restriction on investors or investments made by investors of any other Party, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures:

- (a) necessary to protect public morals or to maintain public order<sup>22</sup>;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
  - (i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract;
  - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
  - (iii) safety;
- (d) inconsistent with Article 3 (National Treatment), provided that the difference in treatment is aimed at ensuring the equitable or effective<sup>23</sup> imposition or collection of direct taxes in respect of investments or investors of any other Party;
- (e) imposed for the protection of national treasures of artistic, historic or archaeological value; or
- (f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

2. Insofar as measures affecting the supply of financial services are concerned, paragraph 2 (Domestic Regulation) of the Annex on Financial Services of the GATS shall be incorporated into and form an integral part of this Agreement, *mutatis*

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<sup>22</sup> The public order exception may be invoked by a Party only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

<sup>23</sup> For the purpose of this subparagraph, footnote 6 of Article XIV of the GATS is incorporated into and forms an integral part of this Agreement, *mutatis mutandis*.

*mutandis.*

## **Article 21**

### **Security Exceptions**

1. Nothing in this Agreement shall be construed:
  - (a) to require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
  - (b) to prevent a Party from taking any actions which it considers necessary for the protection of its essential security interests:
    - (i) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials or relating to the supply of services as carried on, directly or indirectly, for the purpose of supplying or provisioning a military establishment;
    - (ii) taken in time of war or other emergency in domestic or international relations;
    - (iii) relating to fissionable and fusionable materials or the materials from which they are derived;
    - (iv) taken to protect critical public infrastructures, including communication, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructures; or
  - (c) to prevent a Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.
  
2. The Implementing Committee shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

**Article 22**  
**Taxation**

Nothing in this Agreement shall affect the rights and obligations of any Party under any tax agreement to which the Party is a party. In the event of any inconsistency between this Agreement and any such agreement, that agreement shall prevail to the extent of the inconsistency.

**Article 23**  
**Relation to Other Agreements**

1. Nothing in this Agreement shall be construed to derogate from any right or obligation of a Party under international agreements to which the Parties are party.
2. If the international obligations existing at present or established hereafter between the Parties in addition to this Agreement, result in a position entitling investors of any other Party and investments by investors of any other Party to treatment more favourable than is provided for by this Agreement, such position shall not be affected by this Agreement.

**Article 24**  
**Institutional Arrangements**

The institutions as provided for in Article 5.3 of the Framework Agreement shall oversee, supervise, coordinate and review, as appropriate, the implementation of this Agreement.

**Article 25**  
**Consultations**

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

**Article 26**  
**Review and Future Liberalisation**

1. The institutions as provided for in Article 5.3 of the Framework Agreement shall review the implementation of this Agreement.
  
2. The Parties will, through future negotiations, further deepen liberalisation with a view to reaching the reduction or elimination of the remaining restrictions scheduled in conformity with Article 9 (Reservations), on a mutually advantageous basis and ensuring an overall balance of rights and obligations.

**Article 27**  
**Work Programme**

1. The Parties shall enter into discussions on:
  - (a) Article 4 (Most-Favoured-Nation Treatment);
  - (b) TRIMs-plus elements to Article 6 (Performance Requirements);
  - (c) Schedules of Reservations to this Agreement;
  - (d) Procedures for modification of Schedules of Reservations that will apply at the date of entry into force of the Schedules of Reservations to this Agreement;
  - (e) Annex on Expropriation and Compensation;
  - (f) Annex on Taxation and Expropriation; and
  - (g) Article 18 (Investment Dispute Settlement between a Party and an Investor of any other Party).
  
2. The Parties shall conclude the discussions referred to in paragraph 1, within five years from the date of entry into force of this Agreement unless the Parties otherwise agree. These discussions shall be overseen by the Implementing

Committee established under Article 5.3 of the Framework Agreement.

3. Schedules of Reservations to this Agreement referred to in paragraph 1 shall enter into force on a date agreed to by the Parties.

4. Notwithstanding anything to the contrary in this Agreement, Article 3 (National Treatment), Article 4 (Most-Favoured-Nation Treatment), Article 7 (Senior Management and Boards of Directors), Article 9 (Reservations), and in the case of the Lao People's Democratic Republic Article 6 (Performance Requirements), shall not apply until the Parties' Schedules of Reservations to this Agreement have entered into force in accordance with paragraph 3.

### **Article 28**

#### **Annexes and Future Instruments**

This Agreement shall include:

- (a) the Annexes and the contents therein which shall form an integral part of this Agreement; and
- (b) all future legal instruments agreed pursuant to this Agreement.

### **Article 29**

#### **Amendments**

The provisions of this Agreement may be modified through amendments mutually agreed upon in writing by the Parties.

### **Article 30**

#### **Depositary**

For the ASEAN Member States, this Agreement shall be deposited with the Secretary-General of ASEAN, who shall promptly furnish a certified copy thereof, to each ASEAN Member State.

**Article 31**  
**Entry into Force**

1. This Agreement shall enter into force on the first day of the second month following the latter date on which at least one ASEAN Member State and Korea have notified all the other Parties in writing of the completion of their internal procedures.
2. A Party shall, upon the completion of its internal procedures for the entry into force of this Agreement, notify all the Parties in writing.
3. Where a Party is unable to complete its internal procedures for the entry into force of this Agreement by the date as set out in paragraph 1, this Agreement shall come into force for that Party, 30 days after the date on which that Party has notified all the other Parties in writing of the completion of its internal procedures. The Party concerned, however, shall be bound by the same terms and conditions of this Agreement, including any further commitments that may have been undertaken by the other Parties under this Agreement by the time of such notification, as if it had notified all the other Parties in writing of the completion of its internal procedures before the date of entry into force of this Agreement.

**IN WITNESS WHEREOF**, the undersigned, being duly authorised thereto, have signed this Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea.

**DONE** at [ ], in duplicate copies in the English language.

**Annex 1**  
**Approval in Writing**

Where specific approval in writing is required for covered investments by a Party's domestic laws, regulations and national policies, that Party shall:

- (a) inform all the other Parties through the ASEAN Secretariat of the contact details of its competent authority responsible for granting such approval;
- (b) in the case of an incomplete application, identify and notify the applicant in writing within one month from the date of receipt of such application of all the additional information that is required;
- (c) inform the applicant in writing that the investment has been specifically approved or denied within four months from the date of receipt of complete application by the competent authority; and
- (d) in the case an application is denied, inform the applicant in writing of the reasons for such denial. The applicant shall have the opportunity of submitting, at that applicant's discretion, a new application.