



## **FIFTH PROTOCOL TO AMEND THE ASEAN COMPREHENSIVE INVESTMENT AGREEMENT**

The Governments of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Republic of 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 ("ASEAN"), hereinafter collectively referred to as "Member States" or singularly as "Member State";

**RECALLING** the ASEAN Comprehensive Investment Agreement (hereinafter referred to as the "ACIA") signed on 26 February 2009 and which entered into force on 29 March 2012, which aims to create a liberal, facilitative, transparent and competitive investment environment in ASEAN by adhering to principles such as to benefit investors and their investments based in ASEAN;

**RECOGNISING** the additional commitments of Member States under Article 7 (Prohibition of Performance Requirements) of the ACIA as amended by the Fourth Protocol to Amend the ASEAN Comprehensive Investment Agreement signed on 15 July 2020 and which entered into force on 10 January 2023;

**DESIRING** to implement Article 4 (Work Programme) of the Fourth Protocol to Amend the ASEAN Comprehensive Investment Agreement on modifications to Member States' reservations in the Schedule to the ACIA pursuant to the additional commitments under Article 7 (Prohibition of Performance Requirements) of the ACIA as amended by the

Fourth Protocol to Amend the ASEAN Comprehensive Investment Agreement;

**NOTING** the decisions made during the ASEAN Economic Ministers (“AEM”) – 21<sup>st</sup> ASEAN Investment Area (“AIA”) Council Meeting on 29 August 2018 in Singapore agreeing to transition the ACIA reservation lists to the two-annex negative list *“by end-2023, unless otherwise agreed”*;

**DESIRING** to implement the decision of the AEM – 25<sup>th</sup> AIA Council Meeting on 14 September 2022 in Siem Reap, Cambodia for the officials to discuss the Fifth Protocol to Amend the ASEAN Comprehensive Investment Agreement to operationalise the transition of the ACIA reservation lists to the two-annex negative list and incorporate the reservations of Member States against Article 7 (Prohibition of Performance Requirements) of the ACIA as amended by the Fourth Protocol to Amend the ASEAN Comprehensive Investment Agreement; and

**NOTING** that Article 46 (Amendments) of the ACIA provides that the provisions of the ACIA may be modified through amendments mutually agreed upon in writing by the Member States,

**HAVE AGREED AS FOLLOWS:**

**Article 1**  
**Amendments to Article 3 (Scope of Application)**

Article 3 (Scope of Application) of the ACIA shall be amended and replaced as follows:

**“Article 3**  
**Scope of Application**

1. *This Agreement shall apply to measures adopted or maintained by a Member State relating to:*

- (a) *investors of any other Member State; and*
- (b) *investments, in its territory, of investors of any other Member State.*

2. *This Agreement shall apply to existing investments as at the date of entry into force of this Agreement as well as to investments made after the entry into force of this Agreement.*

3. *This Agreement shall not apply to:*

- (a) *any taxation measures, except for Articles 13 (Transfers) and 14 (Expropriation and Compensation);*
- (b) *subsidies or grants provided by a Member State;*
- (c) *government procurement;*
- (d) *services supplied in the exercise of governmental authority by the relevant body or authority of a Member State. For the purposes of this Agreement, a service supplied in the exercise of governmental authority means any service, which is supplied neither on a commercial basis nor in competition with one or more service suppliers; and*
- (e) *measures adopted or maintained by a Member State affecting trade in services under the ASEAN Framework Agreement on Services signed in Bangkok, Thailand on 15 December 1995 (hereinafter referred to as "AFAS") and succeeded by the ASEAN Trade in Services Agreement signed in Manila, Philippines on 7 October 2020*

(hereinafter referred to as "ATISA"), as the case may be.

4. Notwithstanding sub-paragraph 3(e), for the purpose of protection of investment with respect to the commercial presence mode of service supply, Articles 11 (Treatment of Investment), 12 (Compensation in Cases of Strife), 13 (Transfers), 14 (Expropriation and Compensation) and 15 (Subrogation) and Section B (Investment Disputes Between an Investor and a Member State), shall apply, mutatis mutandis, to any measure affecting the supply of a service by a service supplier of a Member State through commercial presence in the territory of any other Member State but only to the extent that they relate to an investment and obligation under this Agreement regardless of whether or not such service sector is scheduled in the Member States' Schedule of Commitments made under AFAS or is reserved in the Member States' Schedules of Non-Conforming Measures made under ATISA.

5. Nothing in this Agreement shall affect the rights and obligations of any Member State under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency."

## **Article 2 Amendments to Article 9 (Reservations)**

1. Article 9 (Reservations) of the ACIA shall be amended and replaced as follows:

**“Article 9  
Reservations and Non-Conforming Measures**

1. Articles 5 (National Treatment), 7 (Prohibition of Performance Requirements) and 8 (Senior Management and Board of Directors) shall not apply to:

- (a) any existing measure that is maintained by a Member State at:
  - (i) the central level of government, as set out by that Member State in its List A of its Schedule of Reservations and Non-Conforming Measures;
  - (ii) the regional level of government, as set out by that Member State in its List A of its Schedule of Reservations and Non-Conforming Measures; and
  - (iii) a local level of government;
- (b) the continuation or prompt renewal of any reservations referred to in sub-paragraph (a); or
- (c) an amendment to any non-conforming measure referred to in sub-paragraph (a) to the extent that the amendment does not decrease the conformity of the measure:
  - (i) for Cambodia, Indonesia, Lao PDR, Myanmar and the Philippines, as it existed at the date of entry into force of the Member State’s List A of its Schedule of Reservations and Non-Conforming Measures; and

(ii) *for Brunei Darussalam, Malaysia, Singapore, Thailand and Viet Nam, as it existed immediately before the amendment,*

*with Articles 5 (National Treatment), 7 (Prohibition of Performance Requirements) and 8 (Senior Management and Board of Directors).<sup>7</sup>*

2. *Articles 5 (National Treatment), 7 (Prohibition of Performance Requirements) and 8 (Senior Management and Board of Directors) shall not apply to any measure that a Member State adopts or maintains with respect to sectors, sub-sectors or activities, as set out in its List B of its Schedule of Reservations and Non-Conforming Measures.*

3. *The Schedules of Reservations and Non-Conforming Measures of Member States shall form a Schedule to this Agreement.*

4. *Any amendment or modification to any reservations contained in the Schedules referred to in paragraph 3 shall be in accordance with Article 10 (Modification of Commitments).*

5. *Articles 5 (National Treatment) and 6 (Most-Favoured-Nation Treatment) shall not apply to any measure covered by an exception to, or derogation from, the obligations under Articles 3 and 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreement, as may be amended (hereinafter referred to as "TRIPS*

---

<sup>7</sup> A Member State may request to amend List A of the Schedule of Reservations and Non-Conforming Measures of another Member State to reflect any liberalisation measure the latter had undertaken. The requested Member State may, subject to its policies or in its sole discretion, consider such request.

*Agreement”), as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.”*

2. Pursuant to the insertion of a new footnote 7 as set out in paragraph 1, the succeeding footnotes of the ACIA shall be renumbered accordingly.

**Article 3**  
**Amendments to Article 22 (Entry, Temporary Stay and Work of Investors and Key Personnel)**

Article 22 (Entry, Temporary Stay and Work of Investors and Key Personnel) of the ACIA shall be amended and replaced as follows:

**“Article 22**  
**Entry, Temporary Stay and Work of**  
**Investors and Key Personnel**

*Subject to its immigration and labour laws, regulations and national policies relating to the entry, temporary stay and authorisation to work, and consistent with its commitments under the ASEAN Agreement on the Movement of Natural Persons signed in Phnom Penh, Cambodia on 19 November 2012, as may be amended, each Member State shall grant entry, temporary stay and authorisation to work to investors, executives, managers and members of the board of directors of a juridical person of any other Member State, for the purpose of establishing, developing, administering or advising on the operation in the territory of the former Member State of an investment to which they, or a juridical person of the other Member States that employs such executives, managers and members of the board of directors, have committed or are in the process of committing a substantial amount of capital or other resources.”*

**Article 4**  
**Amendments to the ACIA Headnote for the**  
**List of Reservations**

The ACIA Headnote shall be amended and replaced as follows:

**“ACIA HEADNOTE FOR THE**  
**SCHEDULE OF RESERVATIONS AND NON-**  
**CONFORMING MEASURES**

1. *The Schedule of ASEAN Member States sets out, pursuant to Article 9 (Reservations and Non-Conforming Measures), Member States’ measures that do not conform to the obligations under:*

- (a) Article 5 (National Treatment);*
- (b) Article 7 (Prohibition of Performance Requirements); and*
- (c) Article 8 (Senior Management and Board of Directors).*

2. *Each reservation sets out the following elements, where applicable:*

- (a) “Sector(s)” refers to the sector(s) in which a reservation is taken;*
- (b) “Sub-Sector(s)” refers to specific industries/products/activities in which a reservation is taken;*
- (c) “Industry Classification” refers to the activities covered by the reservation according to:*

- (i) *International Standard Industrial Classification (ISIC);*
- (ii) *ASEAN Harmonised Tariff Nomenclature (AHTN); or*
- (iii) *UN provisional Central Product Classification (pCPC).*

*As necessary and appropriate, Member States could specify the exact coverage of the reservations if the reservations do not exactly conform to the classification system;*

- (d) *“Level of Government” specifies the level of government (Central or Regional) maintaining the measure for which a reservation is taken;*
- (e) *“Type of Obligation” refers to the obligation(s) of National Treatment, Prohibition of Performance Requirements or Senior Management and Board of Directors, as the case may be, which do not apply to the listed measure(s);*
- (f) *“Description of Measure” shall refer to measures that do not conform to National Treatment, Prohibition of Performance Requirements, or Senior Management and Board of Directors Article(s), for which a reservation is taken; and*
- (g) *“Source of Measure” is identified for transparency purposes only, for existing measures that apply to the sector, sub-sector or activities covered by the reservations.*

3. *Consistent with Article 3 (Scope of Application), as amended by the Fifth Protocol to Amend the ASEAN Comprehensive Investment Agreement, measures affecting liberalisation of investment in services sectors do not fall within the scope of this Agreement and are not included in the Schedules attached to this Headnote. Notwithstanding, noting that there is a transition period for Article 3 subparagraph 3(f) of the ACIA, Member States may make any reservations on measures that do not conform to Article 5 (National Treatment), Article 7 (Prohibition of Performance Requirements) and Article 8 (Senior Management and Board of Directors) for services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying sectors (pCPC 881 – 885) until such time that their respective scheduling of these sectors under the ATISA have been completed pursuant to Article 12 (Transition to Schedules of Non-Conforming Measures) of the ATISA.*

4. *Each Member State reserves the right to make future reservations on measures that do not conform to Article 5 (National Treatment), Article 7 (Prohibition of Performance Requirements) and Article 8 (Senior Management and Board of Directors) on:*

- (a) new and emerging sectors, sub-sectors, industries, products, or activities; or*
- (b) existing sectors, sub-sectors, industries, products, or activities,*

*which are unregulated at the time of submission of the Schedule of Reservations and Non-Conforming Measures.*

5. *In the interpretation of a reservation, all elements of the reservation shall be considered. A reservation shall be interpreted in the light of this Agreement against*

*which the reservation is taken. The "Description of Measure" element shall prevail over all other elements.*

*6. In the case of Brunei Darussalam where the investor is a "permanent resident" of Brunei Darussalam and also non-national of any country, the other Member State concerned may mutually agree to enter into bilateral consultations, on a case-by-case and non-prejudicial basis on the issue of whether to recognise the status of such natural person as an investor of Brunei Darussalam.*

#### **Article 5 Submission of Schedules**

Each Member State shall submit its Schedule of Reservations and Non-Conforming Measures to the ASEAN Secretariat pursuant to Articles 2 (Amendments to Article 9 (Reservations)) and 4 (Amendments to the ACIA Headnote for the List of Reservations) of this Protocol for the endorsement of the AIA Council within 180 days after the date of signing of this Protocol. The endorsed Schedules of Member States shall supersede the previous Schedules.

#### **Article 6 Final Provisions**

1. This Protocol shall form an integral part of the ACIA and shall enter into force after all Member States have notified the completion of their respective internal procedures for the entry into force of this Protocol, or, where necessary, deposited instruments of ratification or acceptance with, the Secretary-General of ASEAN, which, as much as possible, shall not take more than 365 days after the signing of this Protocol.

2. The Secretary-General of ASEAN shall promptly notify all Member States of the notification or deposit of each

instrument of ratification or acceptance referred to in paragraph 1.

3. This Protocol shall be deposited with the Secretary-General of ASEAN, who shall promptly furnish a certified copy thereof to each Member State.

**IN WITNESS WHEREOF**, the undersigned, being duly authorised by their respective Governments, have signed this Fifth Protocol to Amend the ASEAN Comprehensive Investment Agreement.

**DONE** at Manila, Philippines, this Thirteenth Day of March in the Year Two Thousand and Twenty-Six, in a single original copy in the English language.