BUILDING BLOCKS OF U.S.-ASEAN ECONOMIC COOPERATION: AN EVOLUTIONARY APPROACH

Edited by
Pearl Imada Iboshi
Michael G. Plummer
Seiji Finch Naya

Managing Editor
Janis Y. Togashi

A publication of the PITO Project
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The Private Investment and Trade Opportunities (PITO) project seeks to expand and enhance business ties between the U.S. and ASEAN private sectors. The project, which was designed by executives and government experts from Southeast Asia and the United States, is funded by a grant from the U.S. Agency for International Development (AID), with contributions from the U.S. and ASEAN private sectors.

The East-West Center in Honolulu, Hawaii coordinates the policy analysis and problem resolution component of PITO. The Center's functions include implementing the policy analysis and problem-solving agenda; coordinating a policy research network in ASEAN and the United States; assisting PITO ASEAN offices to identify and obtain technical specialists, when required; and organizing symposia and other meetings to bring government officials and private sector leaders together to discuss key policy obstacles to expanded trade and investment in order to identify workable solutions.
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The U.S.–ASEAN economic relationship has evolved impressively over the past decade. Initially, bilateral relations tended to focus on diplomatic and political issues. Today, economic issues tend to be the backbone of the relationship. The comprehensive economic reform and dynamic economic growth in ASEAN—with two members, Thailand and Malaysia, joining Singapore in the prestigious "dynamic Asian economies" grouping—have precipitated a maturation in the U.S.–ASEAN relationship to become a "partnership." This new relationship is reflected in the joint efforts of the United States and ASEAN in regional (e.g., Asia-Pacific Economic Cooperation [APEC]) and international (e.g., the GATT) fora to promote open international markets.

U.S.–ASEAN relations will become even more focused on economic cooperation in the future, which, in turn, depends on closer collaborative links between the U.S. and ASEAN private sectors. The Private Investment and Trade Opportunities (PITO) project was initiated in 1990 by the U.S. Agency for International Development (USAID) to stimulate U.S.–ASEAN private sector links by fostering improved information flows, conducting research designed to break down policy bottlenecks and identifying areas of opportunity in which U.S.–ASEAN cooperation in the future show the most promise.

The present study constitutes the final research contribution of the Policy Analysis and Problem Resolution component of PITO. Its goal is to advocate "building blocks" of economic cooperation between the United States and ASEAN with a focus on private-sector development. At all stages, the project benefited from extensive input from policymakers and private sector representatives in the United States and ASEAN member-states. We would like to extend our appreciation to the various ASEAN government agencies, the U.S. Trade Representative Office, the U.S. Foreign Commercial Service, the U.S. and ASEAN private-sector organizations in the region, other U.S. agencies, and the ASEAN Secretariat, for their time and helpful information. While we can only blame ourselves (or, more exactly, blame each other) for any remaining shortcomings of this endeavor, we greatly appreciate the time and careful attention paid by these individuals to the study their advice and comments effectively molded the project into a truly "regional" effort.

We would also like to take this opportunity to thank all of the individuals who have helped make our component a success over the past four years. While space restrictions prevent us from naming everyone, we would like to acknowledge the following persons: at USAID: Lawrence Ervin, Robert Dakan, Dennis Zvinakis, and their staff; in our ASEAN research network: Chia Siow Yue, Mohamad Ariff, Hadi Soesastro, Victoria Licuanan, and Wisarn Pupphavesa, as well as their associate researchers and staff; and other PITO components including the U.S.–ASEAN Business Council and its ASEAN network, and Technonet Asia. Other individuals include Mohamad Sadli, Rudi Pesik, Amnuay Viravan, Narongchai Akrasanee, Mari Pangetsu, Cesar Virata, and Vincente Paterno.
Finally, we would like to acknowledge the invaluable contribution of the East-West Center. Support for PITO has always been forthcoming from Center leadership, including Michel Oksenberg, Bruce Koppel, and Charles E. Morrison. Special thanks also go to Janis Y. Togashi, who made tremendous efforts beyond the call of duty as editor and researcher. Cynthia Nakachi deserves enormous credit for all her work in the project, as do Paul, Monica, and Matt.

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CHAPTER ONE

U.S.–ASEAN ECONOMIC COOPERATION AT THE CROSSROADS

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Seiji Finch Naya

As we approach the mid-1990s, the United States and ASEAN have reached the point of no return in their respective international commercial policies: their linkages to global markets through trade and investment are so strong that their economic destinies are intricately bound to that of the global marketplace. The share of international trade in the United States’ gross domestic product has grown to approximately one-fourth from only about one-tenth in 1970, and the ASEAN countries have delivered an equally impressive record. In fact, the highly-impressive growth record of the ASEAN countries has been fueled by the international sector, with record increases in exports, particularly manufactures, and direct foreign investment flows (DFI).

Behind the “internationalization” of the U.S. and ASEAN economies has been economic reform. While the United States has been one of the most open economies in the world for some time, continuous reductions in tariff barriers through successive rounds of GATT, exogenous changes in the international economy (such as the energy shocks of the 1970s), liberalization in foreign markets due to multilateral and unilateral liberalization, and technological innovations which have created new products and reduced “transactions” costs associated with international interchange have combined to integrate the U.S. economy even more fully with the international system. In addition to a number of the same “exogenous” changes in the global marketplace, internationalization of the ASEAN economies has been pushed since the mid-1980s by radical economic reform programs, significantly affecting both real and financial sectors.

Combined with a reduction in the political imperatives that previously governed their relationship during the Cold War, the higher stakes that the United States and ASEAN have in the international marketplace require fresh analysis of the U.S.–ASEAN economic relationship. The United States is the second most important trading partner and source of DFI for the ASEAN countries, and is number one for several individual member-states. Moreover, the United States is the primary destination for ASEAN manufactured exports and a leader in supplying new and appropriate technologies to the ASEAN countries. U.S. exports to the ASEAN countries have been growing at approximately 30 percent each year, and as a region, ASEAN constitutes the United States’ third most important overseas market (behind Japan and the European Union). As the ASEAN countries are expected to continue to grow rapidly, the region will likely take on increasing significance in the future.

Nevertheless, at the policy level, frictions—often spurred as much by misunderstanding as fundamental disagreements—have led to conflicts between the United States and ASEAN. For example, problems involving intellectual property protection, restrictions on trade and investment in services, government procurement, and fiscal measures have been frequent
areas of dispute, while new areas of confrontations, such as "social" concerns of environmental protection and labor organization restrictions, have emerged as additional points of friction. Since the development of close and amicable links is in the interest of the United States and the ASEAN member-states, paths leading to effective cooperation need to be explored.

The goal of this report is to analyze key areas of U.S.—ASEAN economic relations and recommend a framework to facilitate trade and investment flows between the two groups, ease tensions, and hopefully, avoid reoccurrence of these misunderstandings. It identifies obstacles to U.S.—ASEAN economic interaction in key areas and explores means to enhance economic integration through a "building block approach." In doing this, the study first gives a comprehensive treatment of problem areas in bilateral trade, investment, and related areas (Chapter Two). Subsequent chapters focus on areas of critical importance to U.S.—ASEAN economic relations: investment relations, intellectual property, and environmental considerations. In each chapter, the status quo of regional and bilateral relations are considered and means to improve the relationship are developed.

BUILDING BLOCKS OF COOPERATION: A MATRIX APPROACH

This study considers means of enhancing economic cooperation through informal and formal agreements. In a trade policy matrix in Chapter Two, possible areas of cooperation are considered under three categories: (1) "basic" agreements (e.g., those included under GATT); (2) "association" agreements which go beyond the basic agreements, even including the possibility of preferential policies; and (3) free trade areas. The United States and ASEAN countries are GATT members without many preferential accords between each other (though, of course, intra-ASEAN trade will be liberalized over a ten-year period through the ASEAN Free Trade Area and other programs) and, hence, bilateral relations are conducted in large part on a "basic" level. However, some bilateral arrangements do exist, e.g., bilateral investment treaties, even if these fall well short of any significant preferential links established, for example, in the case of EU relations with its associate members.

The study also uses a "matrix" approach to analyze existing barriers to U.S.—ASEAN trade and investment as a necessary step before developing a cooperative framework. It begins by "taking stock" of current U.S.—ASEAN trade and investment relations by identifying, in matrix form, tariff and nontariff barriers to trade, trade-related and other investment policies, and auxiliary measures which impinge on U.S.—ASEAN economic integration. Hence, the elements of the matrix provide a comprehensive, comparative overview of commercial policies necessary to devise strategies for cooperative measures.

While tariff and nontariff barriers to trade are numerous and nontrivial in preventing open economic interchange between the United States and ASEAN, these barriers have been coming down over time. U.S. tariffs are among the lowest in the world, and while nontariff barriers have increased in certain areas, U.S. commitments under the Uruguay Round should lead to a phasing out of the most important barriers, e.g., the MultiFiber Arrangement and voluntary export restraints. The Uruguay Round offers less in the form of preventing the use of antidumping duties as vehicles of protection, but some rules have been developed. With respect to the ASEAN countries, tariffs remain relatively high, but they have been falling rapidly due to GATT rounds and unilateral trade liberalization, as have nontariff barriers such as import-licensing arrangements.

The Uruguay Round also addressed investment measures but only when they directly affect trade flows; however, the direct and indirect economic effects of distortionary investment measures are significant. The ASEAN countries have liberalized
many of these distortionary policies but problems remain. Also, in the area of intellectual property protection, the ASEAN countries have made a number of legal changes to improve the protection of intellectual property but important problems remain regarding enforcement. In addition, "social" issues, such as restrictions of labor organization and environmental protection, which can be used as methods of protection were briefly addressed by the Uruguay Round but continue to be mainly determined by bilateral relations. Given the importance of investment, intellectual property protection, and the environment, Chapters 3–5 analyze these issues in a U.S.–ASEAN context.

RECOMMENDATIONS

The study gives the following recommendations for improving U.S.–ASEAN economic relations:

- **Commitment to GATT/WTO.** Any agreement between the United States and ASEAN countries should emphasize each country’s commitment to an open, global economic marketplace. Hence, the ultimate goal of regional cooperation should be another means to achieve the basic objectives outlined in the GATT/WTO.

- **Reduction of disparities in tariff levels.** Disparity of tariff rates between the ASEAN countries and the United States, as well as among the ASEAN economies themselves, remains large. Thus, a first step towards increased trade among these countries would be the unilateral reduction of tariff levels in the high-tariff economies and a reduction of the maximum tariff rate to a set level (say 20 percent) in all countries. As the ASEAN countries reduce their tariff levels, the United States could reduce uncertainty regarding GSP privileges by spelling out specific criteria for graduation or temporary withdrawal of privileges.

- **Tariff binding.** One of the first steps of all integration agreements is to prohibit any increase in tariff levels, or in other words, to bind tariffs at their present levels. As more tariff lines are bound, less uncertainty exists as to the potential for future increases in tariffs and hence, risks are reduced and the costs of trade are lowered. Already the ASEAN countries have agreed to bind a substantial portion of their trade. In carrying on with this trend of lowering uncertainty, data exchange of tariff levels would also be an essential element of any integration agreement. Accurate and accessible information on the tariffs imposed by importing countries would not only facilitate trade, but would also expedite subsequent negotiations on reductions to barriers in trade.

- **Rules of origin.** Rules of origin are laws or regulations that determine the country of origin of goods. Because rigid rules of origin can be obstacles to trade, GATT has as its long-term goal the harmonization of the rules of origin, except where the rules of origin relate to the granting of tariff preferences. An annex to the Uruguay Round agreement sets out a "common declaration" that deals with the operation of the rules of origin on goods which qualify for preferential treatment. In moving towards this goal, information-sharing of present agreements in AFTA and NAFTA and general consistency in procedures are recommended.

- **Nontariff barriers.** While the WTO has imposed stricter rules governing import licensing and quantitative restrictions, many other less-visible NTBs exist in the current international trading environment. Thus the first major step in reducing nontariff barriers will lie in the identifica-
tion of such barriers. Establishment of industry groups to list NTBs in other countries and development of a consultative framework to examine the protective impact of identified barriers are important elements in this endeavor.

- **Customs procedures.** Transactions are simplified when trade is conducted under a unified set of codes; thus, harmonization of codes is an important first step. Although all of the ASEAN countries and the United States base their trade and tariff rates on the Harmonized System (HS), actual procedures are done at a more disaggregated level which is not comparable across countries. Further, differences in customs valuation procedures create uncertainty. Under the WTO, these countries will all move towards a standard valuation process. Technical assistance and cooperation from the United States, a country which already adheres to the GATT system, may be useful to facilitate this change for the ASEAN countries.

- **Financial and nonbank services.** The new General Agreement on Trade in Services (GATS) that was developed under the Uruguay Round provides MFN treatment in most cases and identification of sectors where MFN is not possible. As the next step, the countries in the region should move towards freer trade in services. The first step in this direction would be to ease the process and harmonize the procedures for entry of short-term service providers. Steps can also be taken to allow nonnationals to apply for licenses in professional services, and in many services, especially those which cater to trade and investment, national treatment should be considered. Finally, services should be included in the ASEAN Free Trade Area to increase efficiency and competitiveness of the services sector in the ASEAN countries.

- **Industrial, health, and technical standards.** ASEAN and the United States can consider a model similar to that of EFTA whereby the parties to the agreement recognize the other’s reports on standards. A national firm or agency could do the testing for the technical standards of member countries. In addition, information needs to be gathered detailing the specific standards of each country and regional/state differences if necessary. Consideration should be made in specific areas by the ASEAN countries, if not also by ASEAN and the United States, to harmonize standards wherever possible.

- **Rules of competition.** GATT has no clear guidelines on this issue, but the regulatory framework of the European member-states and the enforcement of such laws are possible approaches to be considered by ASEAN and the United States. In particular, the EC has a regionwide "competitions policy" which serves to ensure that there are no internal impediments to trade and investment. The aggressive way in which the EC has tried to keep markets open and competitive has been hailed by nonmember countries as reassurance against a "fortress Europe." Under EFTA, private firms were allowed to lodge complaints against others alleged to be practicing such unfair competition. The complaint was then examined to determine whether the industry’s practices frustrated trade or not. Member-states also voluntarily tried to remove such situations. A similar system may be considered.
Government aid to industries. The Uruguay Round subsidies code tries to create greater international discipline regarding distortionary subsidy practices by further clarification of the definition and categories of subsidies. With respect to the United States and the ASEAN economies, bilateral agreements have already been reached with respect to government aid to certain industries. Faster compliance to the GATT code and extension of these agreements to other indirect subsidies to exporters could be considered.

Government procurement policies. Under the GATT, procurement of goods and services by central and subcentral governments and government-related entities is to be conducted in a transparent manner under the principles of national treatment and nondiscrimination. Requirements involving minimum local content, technology transfers, and countertrades are explicitly prohibited. Significant changes in the public procurement will be required by the United States and the ASEAN economies except Singapore. Cooperation can help to ensure speedy compliance to the GATT principles between the United States and ASEAN countries. An agreement to reduce the minimum value of government contracts that could be bid on by foreign companies and to consider joint ventures as domestic firms could also be considered. A commitment to reduce "tying" of foreign aid should also be studied. Among the ASEAN countries themselves, further thought should be given to providing national treatment to all ASEAN firms.

Foreign investment. Between the United States and ASEAN countries, a few basic agreements would do much to facilitate investment. The APEC investment code is an important first step towards reducing the uncertainties faced by investors. Double taxation agreements have still not been concluded between the United States and several ASEAN partners. Further, any harmonization of investment rules and regulations within ASEAN would also allow investors to more easily set up industrial networks. Thus, an important first step would be to consider the standardization of investment incentives among the ASEAN countries.

Protection of intellectual property rights. The ASEAN countries have made significant progress in establishing laws in this area, although enforcement remains weak in some countries. There also remain areas of controversy in U.S. patent laws. Further movement towards an international standard will be important. The ASEAN countries should study the possibility of a joint patent office modeled after the European Patent Office, which has generated millions of dollars of savings.

Social issues and trade. Disagreements and frictions between the United States and ASEAN with respect to various social issues have been increasing in importance and, perhaps, pose the most serious problems in U.S.–ASEAN relations. An agreement could be made which would recognize different social policies in each nation and the possibility for concern by other nations regarding these domestic policies. However, each country would pledge to address these issues through political and other diplomatic means, rather than through various types of economic sanctions.
CHAPTER TWO

ESTABLISHING BUILDING BLOCKS OF U.S.-ASEAN ECONOMIC COOPERATION

Pearl Imada-Iboshi
Michael G. Plummer
Seiji Finch Naya

INTRODUCTION

Given the importance of the U.S.-ASEAN economic relationship, how should the United States and ASEAN work to enhance economic cooperation? In the spirit of the times, the first response might be to suggest creating a U.S.-ASEAN Free Trade Area, which would either be free-standing or would come about through an expansion of NAFTA. While this solution may prove viable in the long term and, indeed, might be embraced as an ultimate goal, it is not feasible in the short run. The history of ASEAN economic cooperation teaches us that the region works best together when integration evolves at a slow and deliberate pace. Even AFTA, which represents an important breakthrough for ASEAN, had a long transition process and allowed for a great deal of flexibility. Moreover, given the acrimony over the United States’ recent trade agreement with Mexico, establishing a free trade area with another developing-country group will be politically difficult for the United States in the near future.1

Rather than a formal preferential trading area such as a free trade area or a customs union, we propose a step-by-step approach to economic cooperation which we call the "building blocks" of cooperation. Each "building block" refers to a particular issue and/or sector for which steps can be taken to promote further cooperation and integration. As the United States and ASEAN work towards building such blocks, the important economic features of a free trade area will naturally develop, without having to deal with the economic and political fallout of a top-down, formal free trade area.

The goal of this chapter is to first identify policy areas of economic cooperation. Next, existing international agreements, at both the multilateral and regional levels, are reviewed in detail. The review is intended to be comprehensive in nature, adding analysis and examples where appropriate. Current barriers to U.S.-ASEAN trade and investment are identified following the matrix approach, and areas in which cooperation can be pursued are highlighted.

In executing this analysis, the chapter develops a matrix approach to economic cooperation. A trade policy matrix was generated to clearly delineate the policy areas in which economic cooperation can be undertaken as well as to review existing arrangements (Table 2.1). Within each policy area, the matrix considers a spectrum of the levels of cooperation that have been or can be achieved. In most cases, the level of cooperation begins with those covered under the General Agreement on Tariffs and Trade (GATT) or other standard international agreements. The last column of the matrix deals with the issues as they are generally associated with and addressed in formal cooperative arrangements such as NAFTA and the EC. The middle column recommends the building blocks measures which
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<th>Building Blocks</th>
<th>Free Trade Area</th>
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<tr>
<td>A Tariffs and other import taxes</td>
<td>• MFN treatment, i.e., no less favorable treatment than that accorded to other countries • Binding of tariff levels • Recommend ad valorem vs. specific rates</td>
<td>• Reduction of disparity in tariff levels • Binding at present current levels • Data base of tariff rates</td>
<td>• Elimination of internal tariffs • Elimination of duty drawbacks • Deal with special products</td>
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<td>B Rules of origin</td>
<td>• Common declaration under GATT</td>
<td>• Information sharing • Standardize procedures</td>
<td>• Develop extensive rules • Reduce content rules</td>
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<td>C Nontariff barriers</td>
<td>• Transparency • MFN</td>
<td>• GATT agreement on import licensing</td>
<td>• Identify specific NTBs (through affected industry groups) • Prepare schedule for reduction/elimination</td>
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<td>Import licensing</td>
<td>• GATT agreement on import licensing</td>
<td>• Tariffication of QRs</td>
<td>• Expanded tariffication of QRs • Standstill of QRs</td>
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<tr>
<td>Quantitative restrictions (QRs)</td>
<td>• Transparency • Tariffication of QRs</td>
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<td>D Customs procedures</td>
<td>• MFN</td>
<td>• Transparency • HS</td>
<td>• Harmonization of customs nomenclature and valuation procedures</td>
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<td>Preshipment inspections</td>
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<td>• Transaction value • GATT agreement on customs valuation</td>
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<td>E Market disruption</td>
<td>• MFN</td>
<td>• Serious injury criteria • Limit on duration and extent</td>
<td>• Harmonize codes</td>
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<td>Safeguards</td>
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<td>• Material injury criteria • Retroactive duties • GATT agreement on antidumping</td>
<td>• Consultation or joint panel (in bilaterals)</td>
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<td>Dumping</td>
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<td>• Stricter criteria for partner countries</td>
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<td>F Nonbank services</td>
<td>• MFN • Transparency</td>
<td>• National treatment for some sectors • Reduce citizenship requirements for licensing professionals</td>
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### II Indirect trade-related measures

#### A Industrial, technical, and health standards
- GATT agreement on sanitary and phytosanitary measures
- GATT agreement on technical barriers to trade
- Adoption of international standards such as:
  - Food safety - Codex Alimentarius Commission;
  - Animal health - International Office of Epizootics;
  - Plant health - Secretariat of the International Plant Protection Convention and International Plant Protection Convention;
  - Other international codes: International Organization for Standardization; International Electrotechnical Commission
- Mutual recognition of testing and certification results
- Impartial evaluation panel
- Cooperation in setting or joint determination of new standards
- Cooperation in labelling/packaging requirements
- Harmonization of standards
- Binding arbitration

#### B Structural impediments and rules of competition
1. Antitrust laws
2. Distribution
3. Government monopolies
- Transparency
- Cooperation and studies of impact
- Harmonized competition policy
- National treatment

#### C Government aid to industries
- Subsidies
  - Ban on export subsidies
  - Countervailing duties if adverse impact
  - GATT agreement to reduce subsidies on agricultural commodities
  - GATT agreement on subsidies and countervailing duties
  - Stricter injury test for countervailing duties
  - Transparency of procedures
  - Ban direct and indirect subsidies to exporters
  - Ban subsidies to import substitutes
- Fiscal and tax policies
  - GATT

#### D Government procurement contracts
- Government purchases
  - MFN
  - GATT agreement on government procurement
  - Transparency
  - Increasing openness for government (and government organizations) purchases
  - National treatment for all partners
- State trading enterprises
  - Notification of such enterprises
  - Run on commercial basis
<p>| III Investment and finance | A Currency | • Convertibility of currency | • Guarantees of repatriation of profits and remittances of currencies | • Greater currency harmonization and consultation |
| | | • Convertibility of currency | • Cooperation and monitoring of currencies | |
| | | • Transferability of convertible currencies for trade | • Swap arrangements | |
| | B Banking access | • Ability to open and maintain accounts in both local and foreign currency | • Common standards for measuring health of financial institutions | • National treatment for subsidiaries |
| | | • Ability to open and maintain accounts in both local and foreign currency | • Guarantees of repatriation of profits and remittances of currencies | • National treatment regarding licensing |
| | | • MFN treatment in financial transactions | • Cooperation and monitoring of currencies | |
| C Taxation | Income taxes | • Nondiscriminatory treatment for imports | • Greater tax harmonization of tax structures |
| | Other taxes | • Nondiscriminatory treatment for imports | • MFN treatment for financial transactions |
| D Investment | Investment flows (amount, industry location, and ownership) | • Compensation at fair market price for expropriation | • Increase or remove equity ceilings | • National treatment of foreign investment |
| | | • Compensatio at fair market price for expropriation | • Right of establishment to invest in and engage in all commercial activities except those specifically restricted | • Binding arbitration |
| | | • MFN treatment on DFI with respect to restrictions on amount of DFI, sectoral distribution of DFI, location of DFI, and ownership of land, plant and residences | • Investment guarantee agreements | |
| | Performance requirements | • Transparency of rules | • Transparency of all performance requirements | • Banned for investors of partners |
| | | • MFN treatment for performance requirements | • Harmonization | |
| | | • Ban on restriction of amount of imports or foreign exchange based on export performance | • Schedule reduction | |
| | Export processing zones | • Ban on domestic content on exports required for market access | • National treatment | |
| | | | • Banned for exports to partners | |
| IV Auxiliary | Intellectual property rights | • Paris Convention for the Protection of Industrial Property (1967) | • Consultative panel | • Rigorous protection and joint enforcement programs |
| | | • Berne Convention for the Protection of Literary and Artistic Works (1971) | • Cooperation regarding enforcement (e.g., creating common enforcement standards and procedures) | • Common patents and trademark policies |
| | | • Geneva Convention for the Protection of Producers and Phonograms | • Coordination of patents | |
| | | • MFN treatment for patent and trademark registration and protection | | |</p>
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<td>Special consultative panels</td>
<td>Set up dispute settlement panel</td>
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<td>Enforcement of GATT</td>
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<td>Infrastructural framework</td>
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<td>Standardize procedures</td>
<td>Harmonize regulations (licensing, weight inspection, etc.)</td>
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<td>Rio de Janeiro Convention on International Trade in Endangered Species</td>
<td>Transparency of rules</td>
<td>Cooperation on enforcement</td>
</tr>
<tr>
<td></td>
<td>Montreal Protocol and the Vienna Convention Agreements for the Protection of the Ozone Layer</td>
<td>Bilateral negotiations</td>
<td>Dispute settlement</td>
</tr>
<tr>
<td></td>
<td>Basel Convention on the Control of Transboundary Movement of Hazardous Wastes</td>
<td>Joint border projects</td>
<td>Harmonize environmental standards</td>
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<td></td>
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<td>Openness of judicial procedures</td>
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<td>Cooperation and consultation in setting standards</td>
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<td>Transparency of rules</td>
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<td>Bilateral negotiations</td>
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<td>Joint border projects</td>
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<td>Cooperation and consultation in setting standards</td>
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<td>Transparency of rules</td>
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<td>Bilateral negotiations</td>
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<td>Joint border projects</td>
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<td>Openness of judicial procedures</td>
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<td>Cooperation and consultation in setting standards</td>
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</tr>
<tr>
<td>E</td>
<td>Labor</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Labor mobility</td>
<td>Restricted entry with visa requirements</td>
<td>Relaxation in regulations pertaining to movement of labor</td>
</tr>
<tr>
<td></td>
<td>Domestic labor laws</td>
<td>Not applicable</td>
<td>Harmonization of codes regarding worker safety, child labor, worker rights</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Agreement regarding transparency and domestic enforcement</td>
<td>Dispute settlement</td>
</tr>
</tbody>
</table>

go beyond the standard international agreements without moving toward a preferential trading arrangement. These are measures that can be formulated to enhance trade and investment between the United States and ASEAN countries, without skirting commitments under the GATT/WTO. The trade policy measures of building blocks are divided into three areas—trade-related, investment-related, and other auxiliary measures.

In order to consider appropriate areas in which closer economic cooperation might be pursued, it is important first to "take stock" of existing barriers to U.S.–ASEAN interchange. Hence, for each policy area, individual tables specifying the policies of each ASEAN country and the United States are presented.

**TRADE MEASURES**

Tariffs and quotas directly restrict trade and are the first measures that are considered in discussions of economic cooperation. However, other measures, which may be more difficult to address, are equally if not more important in terms of their impacts on trade, particularly because they tend to be less transparent than traditional barriers. The trade policy matrix presented in Table 2.1 lists six areas falling under the area of trade-related measures: tariffs, rules of origin, nontariff barriers, customs procedures, market disruption, and nonbank services.
<table>
<thead>
<tr>
<th>Country</th>
<th>Types of Tariffs</th>
<th>Range of Tariffs</th>
<th>Average Tariff Levels</th>
<th>Tariff Binding</th>
<th>Preferential Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brunei</td>
<td>ad valorem (96%), specific (4%), and composite, i.e., combination (3 items)</td>
<td>0-30% for applied tariffs</td>
<td>simple avg MFN = 1.2% (1992)</td>
<td>95% of agr. prod. are bound, most at 20%; 94% of industrial prod. are bound, most at 40%</td>
<td>AFTA</td>
</tr>
<tr>
<td>Indonesia</td>
<td>ad valorem (100%); import surcharges (also at ad valorem rates) on about 160 items as of 6/94 (to be removed with UR over 10 years)</td>
<td>0-100% &gt;20% (30%) &gt;40% (5%) ERP = 52% (1992)</td>
<td>simple avg tariff incl. import surcharge = 22% (1990) import wgt'd avg tariff = 10% to be increased to 37.4% w/post-UR</td>
<td>9% of tariff lines are bound, most at ceiling rate of 40% industrial ⇒ 10% ag. goods ⇒ 4% but will increase to 95% w/full implementation of Uruguay Round agreement</td>
<td>AFTA</td>
</tr>
<tr>
<td>Malaysia</td>
<td>ad valorem (88%), specific (2%), and composite &amp; alternate (1,166 items); sales tax that effectively discriminates against imports</td>
<td>5-300% &lt;5% (33%) &gt;20% (39%) &gt;40% (3%) ERP = 23% (1988)</td>
<td>simple avg tariff = 14% (1993) 10% to be reduced to 9% w/post-UR</td>
<td>&lt;1% but will increase to 78% w/full implementation of Uruguay Round agreement</td>
<td>AFTA; w/Australia and NZ on certain canned fruits</td>
</tr>
<tr>
<td>Philippines</td>
<td>ad valorem (&lt;100%); specific (cinematograph films &amp; crude oil); seasonal (fish products)</td>
<td>3-100% by 1995, tariffs of 3-30% ERP = 32% (1992)</td>
<td>simple avg = 23.5% (1993) import wgt’d avg = 18% (1991)</td>
<td>7%</td>
<td>AFTA</td>
</tr>
<tr>
<td>Singapore</td>
<td>ad valorem (28%); specific (54%); composite, i.e., combination (6 items, 7%)</td>
<td>0-50%</td>
<td>simple avg MFN = 0.5% (1989) &lt;1% to be fil to 5.1% w/post-UR</td>
<td>0.6% but will increase to 70% w/full implementation of Uruguay Round agreement</td>
<td>AFTA</td>
</tr>
<tr>
<td>Thailand</td>
<td>ad valorem (75%); specific (3%); alternate (either ad valorem or specific, whichever is higher); also import surcharges</td>
<td>0-200% (statutory) 0-68% (applied) ERP = 51% (1988)</td>
<td>simple avg MFN = 44% (1988) trade wgt’d avg = 16.8% (1991)</td>
<td>3% but will increase to 76% with full implementation of UR</td>
<td>AFTA</td>
</tr>
</tbody>
</table>

Note: AFTA refers to the ASEAN Free Trade Area.
Table 2.2 (continued)

<table>
<thead>
<tr>
<th>Country</th>
<th>Types of Tariffs</th>
<th>Range of Tariffs</th>
<th>Average Tariff Levels</th>
<th>Tariff Binding</th>
<th>Preferential Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>ad valorem (67%); specific (13%); compound, i.e., combination (&lt;1%); compound, i.e., combination (&gt;1%)</td>
<td>&lt;10% (81%); 10.1 to 20%; &gt;20.1% (4%)</td>
<td>simple avg MFN = 7% (1989)</td>
<td>98% but will increase to 100% w/full</td>
<td>U.S.-Israel NAFTA</td>
</tr>
</tbody>
</table>

TARIFFS

Tariffs are the basic mechanism used to protect domestic industries and as such have been the focal point of past GATT agreements. Tariffs can be specified as a percentage of the value of the import (i.e., an ad valorem tariff), as a set amount per item or weight of imported good (i.e., a specific tariff), or as a combination of the two. The fundamental principle in the case of tariffs involves a commitment to most-favored-nation (MFN) and nondiscriminatory treatment. That is, tariffs are assessed on imports regardless of country of origin, and concessions given to any one country are automatically given to all countries with MFN status. Preferential tariff rates are allowed in a few special cases, including preferential rates for integration areas and developing countries. As signatories to the GATT, the United States and the ASEAN countries follow this fundamental principle.

In the United States, 81 percent of all product line items are subject to some kind of import duty (Table 2.2). Of these, about 67 percent (in value terms) were assessed at ad valorem rates, while specific rates were applied to about 13 percent, and compound rates were applied to about 1 percent. Ad valorem rates also represent the majority of tariffs in the ASEAN countries. For instance, the share of tariffs that are assessed as ad valorem rates is 100 percent in Indonesia and the Philippines, 96 percent in Brunei, and about 88 percent in Malaysia. However, specific and compound (or composite) rates are more prevalent in Singapore and Thailand.

**Tariff Levels**

Through the various GATT negotiations, the average tariff levels have declined over the past three decades. Beginning with the Kennedy Round of multilateral tariff bargaining in 1967, the major countries have agreed to across-the-board tariff cuts (with some sensitive items excluded, including agricultural items). As a result, from an average of 40 percent at the time of GATT's inception, global MFN tariff rates will decline to an average level of 3-4 percent with the tariff reductions that were agreed to in the recently concluded Uruguay round.

But while average global tariffs have been reduced to a level where they may be said to approximate free trade, tariffs of certain countries continue to be very high and within countries, significant "spikes" in the tariff lines at the individual commodity level remain. Both factors act to distort trade and resource flows.

For the United States, the simple average MFN rate was relatively low at 7.0 percent in 1989. In contrast, the average MFN rate of the ASEAN countries ranges from less than 1 percent for Singapore to 24 percent for the Philippines in 1993. The range in tariff levels within each country's tariff structure is also much wider in the ASEAN countries, with some tariff "spikes" as high as 300 percent.
Although the same level of external tariff barriers by member countries is not required in free trade areas (in contrast to customs unions), disparities in the national tariff schedules will tend to lead to deflections in production, with resources tending to gravitate towards the country with the lowest tariffs on inputs rather than towards the country with the comparative advantage in a particular industry. As noted by Curzon (p. 20), the EFTA commission decided that:

Even if each country remains formally free to determine its own tariff policy vis-à-vis the outside world, a free trade area cannot sustain large tariff disparities at its frontiers. The temptation to circumvent the high tariffs would be irresistible and the origin rules and documentation requirements would have to be correspondingly strict, thus placing too great a burden on the free movement of goods within the area. Furthermore, an alteration in the external tariff of a member may create new possibilities for distortions of allocation and may alter the negotiated balance of advantages within the area.

In fact, NAFTA would not have been possible if Mexico had not first drastically cut its tariffs (on an MFN basis) to an average of 10 percent so as to be more in line with the lower average tariff level of the United States. The ASEAN Free Trade Area (AFTA) likewise would not have been signed if the more-protected countries (especially Indonesia) had not unilaterally decreased tariff rates.

The importance of MFN tariff disparities was also recently highlighted in the EC association agreements that were signed with several Eastern European countries. These association agreements are used by the EC as a means of preparing member-states for eventual accession, and set forth a time frame for the liberalization of internal tariffs between member-states. The schedule for tariff reduction typically allows a more gradual liberalization of tariff rates for the acceding country while EC tariffs and nontariff barriers on almost all manufactured goods are completely removed over a short time frame (usually about five years). However, the EC enters into such an agreement only when it is convinced that the country is well-prepared, economically and politically, for eventual accession. Thus, although the Eastern European countries sought associate status immediately after the 1989 revolutions, the EC took the time to make sure that these countries would evolve into liberal market economies before it committed itself.

**Tariff Binding and the Use of Other Tariff-like Charges**

As part of the GATT agreements, countries offer to bind tariff rates, or in other words, agree not to increase tariffs beyond the bound level. Tariffs that are not bound can be easily increased, which can lead to uncertainty and detrimental trade effects. For many countries, the bound rate is significantly higher than the actual rate, and for developing countries in particular, only a small number of tariff lines are bound.

The ASEAN countries are no exceptions to this pattern. For example, less than 1 percent of all tariff lines are bound under GATT in Malaysia and Singapore, while in the Philippines, Thailand, and Indonesia, bound tariffs represent only 7, 3, and 11 percent, respectively, of all tariff lines. In contrast, about 98 percent of all U.S. tariff lines are bound. However, in the negotiations leading up to the conclusion of the Uruguay Round, each of the ASEAN countries offered to increase the level of bound tariff lines. Malaysia, Thailand, and Singapore, for example, have agreed to bind more than 70 percent of their tariff lines. Brunei and Indonesia have agreed to bind more than 90 percent of their tariff lines.

As countries begin to negotiate integration groupings, they first agree to refrain from raising levels of protection beyond the status quo. In this way, the negotiating parties establish a basis for
reduction in trade barriers, as well as demonstrating their commitment to negotiate in good faith.

Special Products

In the GATT as well as almost all trade cooperation agreements, special exemptions for tariff applications and reductions have been placed on certain products. These sectors tend to be politically or socially sensitive and characterized by well-defined, special-interest groups. Most notable among existing arrangements are the exceptions given to agriculture and textiles.

Agriculture. For the first time in the history of the GATT, the Uruguay Round has made significant progress in including agriculture under the auspices of the GATT. The Uruguay Round agreement includes market access arrangements which provide for tariffication of all nontariff measures, with the resulting tariffs subject to a 36 percent reduction over six years and a minimum cut of 15 percent for each individual tariff line. The agreement also contains a list of export subsidies subject to reduction commitments. Developing countries have the flexibility to implement the reduction commitments over a period of up to ten years (the least-developed countries are exempt).

The seriousness with which agriculture is regarded in integration agreements is clear. Supporting agriculture in the European Community through the Common Agriculture Policy has been of paramount importance since its formation in 1957, and continues to be a highly sensitive area. The European Free Trade Area left agriculture out of the agreement altogether and although the Canada–U.S. Free Trade Area included tariff cutting in agriculture, it did not remove many nontariff barriers. NAFTA includes a provision for bilateral access (U.S.–Mexico, Canada–Mexico) for agricultural products. AFTA initially excluded agriculture, although the ASEAN Economic Ministers have subsequently (September 1994) agreed to include these products. The CER is one of the few agreements which fully integrates agriculture.5

Including agriculture in an integration agreement is beneficial to exporters, consumers, and overall economic efficiency. Further, it is not clear if "substantially all" trade is included if an integration area decides to exclude agriculture; thus an agreement that does not include agriculture may, in fact, be GATT-illegal. Nonetheless, in many cases, the issue of agricultural trade renders negotiations more difficult. Domestic programs supporting agriculture become less effective without border controls. It is especially difficult if income support is coupled to output.6 Subsidies on exports become expensive as the export-subsidizing country will be encouraging imports from partners (either for export or domestic consumption). Additionally, quotas on nonmembers are difficult to enforce.

In a free trade area, liberalization of agriculture is likely to confront an additional difficulty. Different tariff rates would lead to trade deflection through the lowest tariff market,7 and with homogeneous goods, rules of origin are likely to be less effective since it is difficult to prove origin. Thus there is a tendency for harmonization of tariff levels of agricultural products.

Textiles and clothing. A large percentage of trade in textiles and clothing has traditionally been covered under the Multifibre Agreement (MFA) which sets quantitative restrictions on trade of such items. With the Uruguay Round, however, a timetable has been set for the gradual phase-out of the MFA within ten years, and the general inclusion of textiles and clothing under GATT rules and principles.

Elimination of Duty Drawbacks for Imports

Many countries allow for refunds of duties paid on inputs when the goods for which the inputs were used are exported, but such drawbacks cannot be
claimed if the product is sold in the home market. Duty-free entry of inputs used in the production of exports is also allowed by some countries for goods manufactured in designated export processing zones (EPZs).

GATT does not deal with the issue of duty drawbacks directly, but looks only to see if the drawbacks are a form of export subsidy. As long as the amount of the drawback is not greater than the taxes actually levied (allowing for normal waste), GATT does not consider the drawback to be an export subsidy.

The problem with such drawbacks in a free trade area, however, is that imported materials used to produce goods traded within the area would carry no duty; yet the same inputs would be assessed the duty if used to produce goods consumed in the domestic market. Thus the drawback would, in effect, be an export incentive/subsidy and trade-distorting. Domestic producers of a good destined for the local market would be at a disadvantage vis-à-vis producer-exporters of the same good from member countries who receive duty drawbacks.

In EFTA and NAFTA, duty drawbacks were eliminated for trade within the area and export processing zones were phased out for intra-member trade. The CER does not specifically ban such drawbacks but it does allow producers to file complaints of disadvantage arising from a "prejudicial intermediate goods situation"; the result of such a complaint may be the removal of the drawback. AFTA has not dealt with the issue.

The issue of duty drawbacks will become more important as the countries in the region become more integrated, though it may not be necessary to take any action to prohibit such drawbacks at this time. In fact, because of the large disparities in tariff levels among the countries, duty drawbacks may be a temporary reprieve to avoid production dislocation and other disadvantages in the higher-tariff countries.

Rules of Origin

Rules of origin are laws or regulations that determine the country of origin of goods. These rules determining country of origin are used in assessing which goods qualify for MFN treatment (to GATT members) and for giving preferences to developing countries, and are crucial in integration areas as well. Because rigid rules of origin can be obstacles to trade, GATT has begun to look into this issue. More specifically, the long-term goal of the GATT agreement is the harmonization of the rules of origin, except where the rules of origin relate to the granting of tariff preferences, to ensure that such rules do not themselves create unnecessary obstacles to trade. The Uruguay Round agreement sets up a harmonization program to be initiated as soon as possible and to be completely implemented within three years of initiation. An annex to the agreement sets out a "common declaration" that deals with the operation of the rules of origin on goods which qualify for preferential treatment.

Rules of origin regarding the minimum level of domestic content required are necessary in a free trade area to preserve the differences in external tariff schedules. Without rules of origin, a free trade area effectively becomes a customs union with the tariffs of the most-open country being applied to the entire trading bloc. However, rules of origin can also increase the protection accorded to domestic industries in a free trade area and the distortive impact of trade barriers on domestic production.

Various approaches have been taken by integration groups to deal with this issue including the use of percentage of value and a minimum level of "substantial" transformation (i.e., as determined by a change in the tariff heading of the good) as defining criteria. NAFTA basically uses the substantial transformation rule although for specific goods, a
minimum percentage of local content is specified. Many have expressed concern that the rules of origin under NAFTA provide more opportunity for discrimination of goods from non-NAFTA members than any other part of the agreement. AFTA, on the other hand, requires a 40 percent ASEAN content level; many other groupings require 50 percent local content.

If no formal integration grouping is being formed, there is no need to directly confront the issue beyond the common procedures recommended by the GATT. Nevertheless, the fact that GATT does not deal with this issue as it relates to preferential trading areas means that the potential for these rules to be used as trade barriers is great.

NONTARIFF BARRIERS

Nontariff barriers (NTBs) are regulations other than tariffs which directly alter the volume or composition of international trade. These barriers, including quantitative restrictions and licensing systems, are often a more noxious form of trade restriction as they are less transparent than tariffs and tend to encourage additional costs as firms use various means to obtain the coveted licenses.

A basic principle of GATT is that domestic industries should be protected by tariffs rather than restrictions that control the quantity of trade directly. The economic effects of tariffs, be they specific or ad valorem rates, are relatively easy to measure and distortionary effects can be readily quantified; hence, reductions in tariffs at the GATT have been relatively smooth. However, NTBs are highly diverse, often country-specific, and extremely difficult to measure. Thus, NTB agreements at the GATT have been elusive, and despite GATT’s opposition, many nontariff barriers remain and new ones continue to be invented. The Uruguay Round agreement included specific measures for the rollback of NTBs in the international system, but the complicated nature of these protectionist devices often render them difficult to codify at the international level.

Agreements on NTBs tend to be easier in a free trade area in which the number of members is smaller. For example, prior to the Single Market program initiated in 1986, there were no tariff barriers between the EC member-states and there was a common external tariff, but each country had its own set of NTBs vis-à-vis outsiders. A major element of the Single Market program was to harmonize external NTBs so as to remove the partial segmentation created. As part of the association agreements with the Eastern European countries, the EC was able to explicitly include liberalization of NTBs in several important areas, such as textiles and clothing (to be phased out by 1998), coal (over a five-year period), steel (quotas were dropped in 1992). However, antidumping duties have been activated, with the European Confederation of Iron and Steel Industries pressing charges against Polish steel beam exports), and automobiles (gradual liberalization).

Import Licensing

Import licensing—that is, the requirement of an application or other documentation to a relevant administrative body (other than that required for customs purposes) as a prior condition for importation—can be used by governments for statistical or other similar purposes and are not necessarily meant to be import barriers. This is especially true for automatic licensing, where approval of applications is granted in all cases. It is clear, nonetheless, that most licensing is done to restrict trade by controlling the quantity of imports. GATT has strengthened the disciplines governing the use of import licensing systems by requiring greater transparency.

With the exception of Singapore, all of the ASEAN countries require non-automatic licensing for imports of a variety of products (Table 2.3). Licensing restrictions are more prevalent for agricultural
<table>
<thead>
<tr>
<th>Country</th>
<th>GATT Agreement on Import Licensing</th>
<th>Coverage of Restricted, Nonautomatic Licensing</th>
<th>QRs, Quotas, and Bans (Formal)</th>
<th>Local Content Requirements (LCRs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brunei</td>
<td>Observer</td>
<td>-3% of all tariff items (1994) including sugars, soybean, wheat, alcoholic beverages, specific petroleum prod., vehicles, explosives, steel products, pumps, specific heavy equip., garlic, cloves, some dairy prod. (about half to be removed under the UR)</td>
<td>imports of alcoholic beverages are banned</td>
<td>none</td>
</tr>
<tr>
<td>Indonesia</td>
<td>Observer</td>
<td>about 10% of all tariff lines including poultry, meat, rice, sugar, wood, motor vehicles and parts, motorcycles, dairy products, coffee (not roasted), specific iron and steel products, some raw agriculture products, plastic resins</td>
<td>quotas on milk and cream and rice to be tariffed under UR</td>
<td>component industries of machine and transport equipment sectors (incl. motorcycles and motor vehicles, heavy equip., elec. home appliances, agr. machinery, electrical equip. and machine tools); milk (33% LCR); soybean cake</td>
</tr>
<tr>
<td>Malaysia</td>
<td>Observer</td>
<td>more than 100 items regulated (as of 1993)</td>
<td>multicolor copying machines, certain radio receivers, and specific animal/wildlife articles; de facto ban on whole chicken and chicken parts</td>
<td>motor vehicles (45-60% LCR) through a mandatory deleted components policy; also have preferential tax system for auto manuf. whose products contain a certain share of domestic content</td>
</tr>
<tr>
<td>Philippines</td>
<td>Signatory</td>
<td>almost no automatic licensing except for rice</td>
<td>feeder cattle, horses; coffee, onions, potatoes, garlic and cabbages; gambling devices -150 items (2.5% of tariff lines) in 1992</td>
<td>passenger cars (40% LCR)</td>
</tr>
<tr>
<td>Singapore</td>
<td>Signatory</td>
<td>47 product categories, mostly of agr. goods, about 4% of 4-digit HS lines (as of 1994)</td>
<td>amusement machines, chewing gum, certain toys, certain plants, and animal/wildlife articles</td>
<td>none</td>
</tr>
<tr>
<td>Thailand</td>
<td>Observer</td>
<td>certain chemicals, selected food products</td>
<td>dairy products, tea, and motor vehicles (45% for passenger cars 1989; 40-70% for commercial vehicles) as well as parts (Jan 1994)</td>
<td>none</td>
</tr>
</tbody>
</table>
Table 2.3 (continued)

<table>
<thead>
<tr>
<th>Country</th>
<th>GATT Agreement on Import Licensing</th>
<th>Coverage of Restricted, Nonautomatic Licensing</th>
<th>QRS, Quotas, and Bans (Formal)</th>
<th>Local Content Requirements (LCRs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>import restrictions of textiles and clothing (MFA), dairy prod., peanuts, sugar prod., cotton prod. (14 textile prod. in 1994)</td>
<td>tobacco products (75% LCR) (p. 80)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

goods in Thailand. Some agricultural products are also subject to non-automatic licensing in Indonesia and Malaysia, though in these countries certain manufactured goods are also protected by licensing requirements. In the Philippines, more than 100 items are regulated (as of 1993).

Quantitative Restrictions (QRs)

Quantitative restrictions provide protection for an industry which is not price-sensitive. Regardless of how high demand increases or how low a price a firm in another country can charge for a good, the quantity of imports is set by the regulation. A quota has a tariff equivalent, that is, a tariff can be calculated for the amount that a quota increases the domestic price. In the case of a tariff, a highly competitive producer may still be able to undercut inefficient domestic producers even if he pays the tariff. With a quota, this is not possible.

Quantitative restrictions have been allowed to persist in the GATT, especially for agricultural goods and goods under the MultiFibre Arrangement. Developed countries have committed to the tariffication of QRs in both of these areas in the Uruguay Round. While the transitional period is longer and more exemptions have been granted in the case of developing countries, they have committed to standstill, rollback, and phaseout of many types of QRs.

Although the United States currently has quantitative restrictions on imports of textiles and clothing, dairy products, peanuts, sugar, and cotton, these will be phased out with the full implementation of the Uruguay agreement. Quantitative restrictions have not been pervasive and have been declining in ASEAN, though as shown in Table 2.3 some specific commodities have been subject to QRs.

Export Restrictions and Other Nontariff Barriers

Export restrictions are used by countries for goods considered to be of strategic importance or natural resource-based goods for conservation purposes. Integration areas attempt to reduce or eliminate such restrictions. The CER prohibited the imposition of new restrictions but allowed countries to take measures to prevent reexport of restricted goods from partners to countries outside the integration area.

Many other less-apparent NTBs exist in the current international trading environment. Thus the first major step in reducing nontariff barriers will lie in the identification of such barriers. Establishment of industry groups to list NTBs in other countries and development of a consultative framework to examine the protective impact of identified barriers are important elements in this endeavor.
Table 2.4 Customs Procedures

<table>
<thead>
<tr>
<th>Country</th>
<th>Customs Nomenclature</th>
<th>GATT Agreement on Customs Valuation</th>
<th>System of Valuation</th>
<th>Preshipment Inspections</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brunei</td>
<td>6,542 9-digit lines under HS system</td>
<td></td>
<td>Brussels Definition of Valuation (BDV)</td>
<td></td>
</tr>
<tr>
<td>Indonesia</td>
<td>9,100+ 9-digit lines under HS system</td>
<td>Observer</td>
<td>Brussels Definition of Value (BDV)</td>
<td>required for imports ≥US$5,000</td>
</tr>
<tr>
<td>Malaysia</td>
<td>11,746 9-digit lines under HS system</td>
<td></td>
<td>Brussels Definition of Value (BDV)</td>
<td>no</td>
</tr>
<tr>
<td>Philippines</td>
<td>5,561 8-digit lines under HS system</td>
<td>Observer</td>
<td>Home Consumption Value (HCV) but commitment to replace w/system based on transaction or invoice value</td>
<td>yes</td>
</tr>
<tr>
<td>Singapore</td>
<td>5,842 9-digit lines under HS system</td>
<td>Observer</td>
<td>Brussels Definition of Value (BDV)</td>
<td></td>
</tr>
<tr>
<td>Thailand</td>
<td>5,300 6/7-digit lines under HS system</td>
<td>Observer</td>
<td>Brussels Definition of Value (BDV)</td>
<td></td>
</tr>
<tr>
<td>United States</td>
<td>9,121 (6-digit?) lines under HS system</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

CUSTOMS PROCEDURES

Customs Valuation

Article VII of the GATT calls for the use of "actual value" of the goods in all sales, or the invoice price plus other legitimate costs and discounts (not including tariffs and other taxes imposed by importing country) when the "merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions." When the accuracy of the declared value of the imported goods is in doubt, the customs officials may request further information from the importers. If despite this additional information the customs value of the imported goods cannot be determined on the basis of the declared value, then the transaction value of identical or similar goods that were exported at or about the same time as the goods to be valued can be used. If this information is not available, then the selling price of the goods concerned (or identical or similar goods imported), as evidenced by the sales invoice or current price list, can be used. All of the ASEAN countries are observers to the GATT Agreement on Customs Valuation (Table 2.4).

Except for the Philippines, however, all of the ASEAN member-states (including Brunei) use, sometimes in combination with the GATT agreement, the Brussels Definition of Valuation (BDV), which was adopted by the international community in 1953. The BDV defines the normal price of the goods to be valued as the price the goods would fetch in the open market at the time the duty becomes payable, where the buyer and seller are independent of each other and not influenced by any commercial, financial, or other relationship other than that created by the sale itself. Like the GATT agreement, the BDV includes the cost of goods plus other legitimate costs and discounts which are freely available to all parties.
and excludes special discounts, duties, and taxes levied in the country of importation. The major difference between the BDV and Article VII of the GATT agreement is that the BDV gives a precise definition of value, but does not give any precise method of calculating the dutiable value. Thus the calculation of import value differs across countries. For example, to determine the value of an imported good, Malaysia generally uses the invoice value, Indonesia uses a reference price based on "prevailing export market prices for goods over US$5,000," and Thailand uses a "check list" price, which is generally the highest import price recorded during the immediate preceding six months. In contrast, the GATT agreement gives precise methods of determining the customs value and does not leave much room for contracting parties to choose their own methods of calculation. Hence, it would appear that the GATT agreement ensures greater uniformity in customs valuation among member countries. Nonetheless, the BDV follows the basic principles laid down by the GATT.

The Philippines employs the Home Consumption Value (HCV) system of valuation, which uses the value at the port of origin to determine the dutiable value of the import. The rationale for the use of the HCV system is to counteract the undervaluation of imports. However, the impact is to increase the distortion inherent in the system of protection. That is, because the domestic price available to the public is used in the HCV system, the value of the import includes all costs including distribution, advertising, and transportation. Thus, the HCV is generally higher than the invoice price. Estimates of the difference between the HCV and the invoice price range from about 10 to 35 percent and show a wide variation by products.

Customs Codes

Transactions are simplified when trade is conducted under a unified set of codes. It has thus been a great contribution that most countries have adopted the Harmonized System (HS) to specify trade flows and tariff rates. Harmonization of codes is an important first step in trade negotiations as seen with the subsidization of Eastern European countries by the EC to encourage the use of the HS system.

While the ASEAN countries have also adopted the HS system, many of the member-states further disaggregate the standard six-digit HS code in preparing their tariff schedules. Brunei, Indonesia, Malaysia, and Singapore report trade and/or tariff at the nine-digit level, while the Philippines uses a HS eight-digit classification. Only Thailand employs the standard six-digit system. At these more disaggregated levels, tariff lines are not necessarily comparable across countries and these differences are difficult to reconcile. For example, Indonesia disaggregates other vegetable oils (HS150790) into neutralized and bleached and other, while Malaysia employs the same numbers to designate solid fractions not chemically modified and other.

Preshipment Inspections

Preshipment inspection refers to the practice of employing specialized private companies to check shipment details which are essentially the price, quantity, and quality of goods that are imported. Used by governments of developing countries, the purpose of these inspections is to safeguard national financial interests (for example, the prevention of capital flight and commercial fraud as well as customs duty evasion) and compensate for inadequacies in administrative infrastructures. The GATT agreement requires MFN treatment, transparency, protection of confidential business information, avoidance of unreasonable delay, the use of specific guidelines for conducting price verification, and the avoidance of conflicts of interest by the agencies involved. The obligations of the exporting Contracting Parties to GATT include national treatment regarding domestic laws and regulations, prompt publication of such laws and regulations, and the provision of technical assistance wherever requested.
MARKET DISRUPTIONS

Measures to prevent severe market disruptions permit governments to take emergency measures to protect a sector threatened by import competition on the understanding that these emergency measures are to be temporary and digressive. Such measures are an important part of the GATT agreement, as well as bilateral and integration agreements.

Safeguards

If governments resort to protectionist measures whenever import competition becomes serious enough to force adjustments on domestic industries, then any trading agreement, be it GATT or an FTA, becomes meaningless. Yet governments find it difficult to sign an agreement to significantly reduce trade barriers without a safety net in case of extreme circumstances. In the example of large import surges, a government may find it politically necessary to abrogate an agreement. Escape clauses allow members to derogate temporarily on one aspect of the agreement and yet maintain the general commitments of the agreement as long as the escape actions are limited.

Clearly the overuse of safeguards or avoidance of GATT disciplines through bilateral measures such as "voluntary" export restraints can make the agreement less valuable. Article XIX of the GATT allows a member to take a "safeguard action to protect a specific domestic industry from an unforeseen buildup of imports of any product which is causing, or which is likely to cause, serious injury to the industry." The agreement sets out the criteria for establishing "serious injury" and the specific impact of imports. Because the measures should only be applied to the extent necessary to prevent or remedy serious injury and to facilitate adjustment, limits have been placed as to the amount of imports that can be restricted (generally not below the annual average for the last three representative years), the time period for which the safeguard action can be utilized (generally not more than four years), and the use of the safeguard clause against imports of developing countries.

In practice, Article XIX is rarely involved. Over the 1985-1991 period, there were only 25 cases in which the safeguard clause was used by GATT members. Except in the case of Indonesia (dairy products, cloves), the ASEAN countries and the United States have not resorted to Article XIX (Table 2.5).

Dumping

Dumping refers to the sale of a product at less than its normal value or at an export price that is less than the comparable price for a like product sold in the domestic market. In Article VI of the GATT, dumping is condemned if "it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry." Under GATT, no antidumping duties can be levied while a review is being carried out. However, if it is determined that dumping did occur, antidumping duties can be levied retroactively. Moreover, even if it is determined that dumping did not occur, the accused company could experience serious production and/or financial disruptions during the review. Over the 1985-1993 period, the United States initiated 402 dumping investigations and the EC, Australia, Canada, and other developed countries also filed numerous complaints.

NONBANK SERVICES

Recognizing its growing importance in the global economy, trade in services is included for the first time in the new General Agreement on Trade in Services (GATS). The agreement provides MFN treatment in most cases and identification of sectors where MFN is not possible. Countries were required to submit market access offers covering a wide range of professional, business, financial, and educational services, and must eliminate access provisions in these areas or negotiate with trade partners to retain
<table>
<thead>
<tr>
<th>Country</th>
<th>Safeguards</th>
<th>Dumping</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>GATT Anti-dumping Code</td>
</tr>
<tr>
<td>Brunei</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>Indonesia</td>
<td>yes, some dairy products, cloves</td>
<td>no</td>
</tr>
<tr>
<td>Malaysia</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>Philippines</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>Singapore</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>Thailand</td>
<td>no</td>
<td>no</td>
</tr>
</tbody>
</table>
them. Transparency requirements include publication of all relevant laws and regulations. The delineation of present barriers to trade in services, brought about by the inclusion of services into the GATT framework, has been one of the most important steps toward liberalization of trade in services, which is one of the most protected sectors worldwide.

A major success of the "EC 1992" program in Europe was the dismantling of practically all barriers in this area. NAFTA also made a major step forward in liberalizing trade in services by committing (for the most part) to national treatment in nonbank services. While NAFTA was successful in liberalizing trade and investment in this area—particularly in the Mexican market—it falls short of creating an integrated North American market. The CER also liberalized services but is not as ambitious as the "EC 1992" program. AFTA is beginning to consider liberalization of trade services.

Presently, as seen in Tables 2.6-2.7, many barriers to trade in services exist in the ASEAN countries and the United States. In the United States, the wide range of requirements and the lack of transferability of licenses across states present major challenges to both foreign as well as domestic service providers. Some states have citizenship or residency restrictions on the provision of services. All of the ASEAN countries with the exception of Singapore have equity restrictions, citizenship requirements, and numerous regulations governing the number and length of stay of expatriates. In many cases, majority ownership is not allowed. Singapore provides national treatment in many areas with only a requirement of residence, though it does have restrictions on foreign ownership or participation in the law and engineering professions.

RECOMMENDATIONS FOR COOPERATION IN TRADE-RELATED MEASURES

As countries consider integration agreements, including the formation of a free trade area, there are two important steps. First, the disparities of tariff rates between the prospective members should not be too large. Second, all countries must commit to standstill and eventually rollback of existing levels of protection. While the United States and ASEAN are not considering the formation of a FTA, these two steps are nevertheless relevant for the less formal building blocks approach taken in this study, which, it is argued, is the most relevant and promising in the furthering of U.S.–ASEAN ties. These recommendations, along with other recommendations of the study, are listed below.

Disparities in tariff rates must be reduced. As was discussed earlier, the disparity between the average tariff rates of the ASEAN countries and of the United States remain large. Thus, an important early step towards increased trade among these countries would be the unilateral reduction of tariff levels in the high-tariff economies and reduction of the maximum tariff rate to a set level (say 20 percent) in all countries. For the ASEAN countries, this would be, in effect, a "multilateralization" of the Common External Preferential Tariff scheme being used to create AFTA.

Any increase in current levels or enactment of new trade barriers must be prohibited. In other words, tariffs and other measures must be bound at their (actual) present levels, with any reductions based on this actual rate. With full implementation of the Uruguay Round, U.S. tariff levels of all goods will be bound. The movement by ASEAN countries to increase the number of bindings under the GATT is a step in the right direction. Data exchange of these levels is also essential.
Table 2.6 Professional Services

<table>
<thead>
<tr>
<th>Country</th>
<th>Accounting</th>
<th>Law</th>
<th>Architects and Engineers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indonesia</td>
<td>foreign firms must operate through technical assistance arrangements with local firms; citizenship required for licensing</td>
<td>foreign firms not allowed to establish a practice nor appear in court</td>
<td>joint operation through a representative office</td>
</tr>
<tr>
<td>Malaysia</td>
<td>commercial presence only through locally registered partnership; foreign interest not to exceed 30%</td>
<td>not more than 30% foreign equity; foreign lawyers not permitted to work as foreign legal consultants</td>
<td>foreigners must establish joint ventures; architectural &amp; engineering services may be supplied only by a natural person</td>
</tr>
<tr>
<td>Philippines</td>
<td>na</td>
<td>na</td>
<td>na</td>
</tr>
<tr>
<td>Singapore</td>
<td>none, except at least one of the partners must be effectively residing in Singapore</td>
<td>allowed to advise clients on U.S. or international law only</td>
<td>none, should be registered professional engineers and effectively a resident of Singapore</td>
</tr>
<tr>
<td>Thailand</td>
<td>citizenship required for license; foreign equity participation must not exceed 49% of registered capital</td>
<td>citizenship required for license, foreign equity participation must not exceed 49% of registered capital</td>
<td>citizenship required for license, foreign equity participation must not exceed 49% of registered capital</td>
</tr>
<tr>
<td>United States</td>
<td>one state has nationality requirements but several states have in-state office or residency requirements; licensing often requires total or partial requalification</td>
<td>only 15 states permit foreign legal consultants to be licensed to practice international law</td>
<td>citizenship required in some states for engineers</td>
</tr>
</tbody>
</table>

Nontariff barriers need to be identified and a standstill of these barriers should be agreed upon. The first major step in reducing nontariff barriers will lie in their identification. Establishment of industry groups to list NTBs in other countries and development of a consultative framework to examine the protective impact of identified barriers are important elements in this endeavor. As with tariff barriers, a commitment to the standstill of NTBs is necessary to begin any cooperative arrangement. Additionally, efforts should be made to expand or speed up tariffication of quantitative restrictions beyond the commitments that were made in GATT.

Information regarding rules of origin in present agreements such as AFTA and NAFTA should be shared and a general consistency in procedures is recommended. GATT has for the first time adopted common rules of origin. However, no effort was made to harmonize rules of origin across different integration groupings. Rules of origin under AFTA and NAFTA differ considerably. Thus consideration needs to be made as to how these rules can be made more consistent with one another and, if it is possible, to use similar reporting procedures in certain cases.

Harmonize customs nomenclature and systems of valuation. The easiest way to deal with the problem of different tariff classifications is for all countries to adopt the HS six-digit classification for the determination of tariff levels. In addition, there
Table 2.7 Other Services

<table>
<thead>
<tr>
<th>Country</th>
<th>Advertising</th>
<th>Motion Pictures</th>
<th>Construction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indonesia</td>
<td>majority foreign participation</td>
<td>prohibits branches or subsidence of foreign film and</td>
<td>must be a joint operation with an Indonesian</td>
</tr>
<tr>
<td></td>
<td>not allowed</td>
<td>video tape distributors; importation and distribution</td>
<td>member of the Indonesian Contractors Association</td>
</tr>
<tr>
<td></td>
<td></td>
<td>restricted to 100% Indonesian-owned companies</td>
<td>through a representative office</td>
</tr>
<tr>
<td>Malaysia</td>
<td>maximum 30% ownership;</td>
<td>locally incorporated; maximum 30% of foreign</td>
<td>representative office or locally</td>
</tr>
<tr>
<td></td>
<td>advertisements must have at</td>
<td>shareholding</td>
<td>incorporated joint venture</td>
</tr>
<tr>
<td></td>
<td>least 80% local content and be</td>
<td></td>
<td>(maximum 30%)</td>
</tr>
<tr>
<td></td>
<td>made in Malaysia (except for</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>ASEAN countries)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Philippines</td>
<td>30% maximum foreign ownership;</td>
<td>na</td>
<td>na</td>
</tr>
<tr>
<td></td>
<td>all executives and managing</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>officers must be Philippine</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>citizens</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Singapore</td>
<td>maximum 1/3 ownership to</td>
<td>citizenship required for license; foreign equity</td>
<td>none</td>
</tr>
<tr>
<td></td>
<td>foreigners</td>
<td>participation must not exceed 49% of registered</td>
<td></td>
</tr>
<tr>
<td>Thailand</td>
<td>citizenship required for license;</td>
<td>registered capital</td>
<td></td>
</tr>
<tr>
<td></td>
<td>foreign equity participation</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>must not exceed 49% of registered</td>
<td></td>
<td></td>
</tr>
<tr>
<td>United States</td>
<td>na</td>
<td>na</td>
<td>na</td>
</tr>
</tbody>
</table>

is clearly a need for a fair, uniform, and neutral system for the valuation of goods for customs purposes. In terms of any cooperative effort between the ASEAN economies and the United States, the adoption of the same system of valuation would enhance trade among the countries. As a first step, ASEAN and the United States could consider the GATT agreement, which is most likely to ensure uniformity. Special measures can then be taken for products that are especially susceptible to undervaluation under the GATT approach.

Harmonize procedures for service providers. In similar fashion, the countries in the region should also move toward freer trade in services. The first step in this direction would be to ease the process and harmonize the procedures for entry of short-term service providers. Steps can also be taken to allow nonnationals to apply for licenses in professional services, and in many services, especially those which cater to trade and investment, national treatment should be considered. Moreover, private sector-based consultative panels in appropriate areas could be convened to consider "mutual recognition" of certain service providers, e.g., with respect to licensing.

INDIRECT TRADE-RELATED MEASURES

As is evident from its name, "indirect" trade-related measures pose important challenges to economic integration as, by their very nature, they are more complicated and less transparent than the direct barriers discussed earlier. Still, these indirect measures tend to be important impediments to economic interchange. In this section, we identify several groups of these indirect measures, i.e., industrial, technical and health standards; structural
impediments; government aid to industries; and public procurement.

INDUSTRIAL, TECHNICAL, AND HEALTH STANDARDS

In the interest of safety, performance or accuracy, and efficiency or convenience, governments typically set industrial, technical, or health standards on imports of specific items. These standards, however, can be a problem in international trade as these standards and specifications vary widely from country to country, making it impossible for manufacturers to enjoy the economies of scale that are theoretically available to firms supplying the world market. Moreover, these standards can be used as indirect protectionist devices. While harmonization of standards would appear to be the simple solution, harmonization is, in fact, difficult to attain. Differences in standards are a reflection of the different community demand curves for safety, health, performance, beauty, etc., in each country and it is highly unlikely that even countries with the same standard of living would elect to have the same technical standards. This problem of divergent national standards inevitably bothers regional trading groups, and pressure to harmonize standards is felt by all integration areas.

While the GATT recognizes that countries should not be prevented from, among other things, taking measures for the protection of human, animal and plant life, health, and the environment, it also specifies that the standards should not restrict trade, nor be more restrictive than necessary to fulfill a legitimate objective. All standards should be MFN and transparent. Foreign manufacturers are to be granted access to domestic certification systems and the use of international standards—such as the Codex Alimentarius Commission for food safety, the International Office of Epizoodics for animal health, and the Secretariat of the International Plant Protection Convention and the International Plant Protection Convention for plant health—is encouraged by GATT whenever available.

Regional groupings have found that they generally have to go further than the GATT in dealing with such measures. As the EC developed and enlarged over time, it became increasingly clear that the existing customs union arrangement fell well short of the integrated market envisioned in the Treaty of Rome in large part due to indirect barriers to trade. For example, differences in national product regulations and technical standards caused important distortionary effects by limiting benefits of economies of scale, increasing inventory and testing costs, and discouraging cooperation. The EC has tried to standardize all such codes as part of the Single Market program. EFTA drew up a series of open-ended agreements for the mutual recognition of test reports which have no discriminatory impact on the outside world. This reduces the disadvantage to the manufacturer of discrimination or high fees for the required testing. A national firm or agency could do the testing for the technical standards of member countries. In NAFTA, each party is allowed to maintain its own standards as long as there is a scientific basis for the standard and it is not a disguised restriction on trade. The agreement also provides for dispute settlement on such issues. In addition, a committee was created to cooperate on such matters. ASEAN and the United States are signatories or observers to most of the major standards organizations (Table 2.8).

STRUCTURAL IMPEDIMENTS AND RULES OF COMPETITION

In some industries, firms have managed to protect themselves from the discipline of the market by means of intrafirm agreements that limit competition, divide the available market, pool research and purchasing facilities, adopt common attitudes to advertising or after-sales service, and engage in exclusive dealing arrangements. These can be potential threats to the proper working of a free trade area.
<table>
<thead>
<tr>
<th>Country</th>
<th>GATT Agreement on Technical Barriers to Trade</th>
<th>Int'l Org. for Standardization (ISO)</th>
<th>Int'l Electrotechnical Committee</th>
<th>Codex Alimentarius</th>
<th>Conformity of Standards to Int'l Criteria?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brunei</td>
<td>Correspondent member</td>
<td></td>
<td></td>
<td></td>
<td>health/technical standards generally follow int'l standards</td>
</tr>
<tr>
<td>Indonesia</td>
<td>Observer</td>
<td></td>
<td></td>
<td></td>
<td>of the 1,462 standards formulated, 304 (21%) are identical or equiv. to int'l standards</td>
</tr>
<tr>
<td>Malaysia</td>
<td>Signatory</td>
<td>Signatory</td>
<td>Signatory</td>
<td>Signatory</td>
<td></td>
</tr>
<tr>
<td>Philippines</td>
<td>Signatory</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Singapore</td>
<td>Signatory</td>
<td>Signatory</td>
<td>Signatory</td>
<td>no</td>
<td>health/safety standards follow int'l standards; 10 major Acts relating to technical standards apply to imports &amp; domestically produced goods equally</td>
</tr>
<tr>
<td>Thailand</td>
<td>Observer</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>United States</td>
<td>Signatory to MTN Standards Code</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Table 2.9 Structural Impediments and Rules of Competition

<table>
<thead>
<tr>
<th>Country</th>
<th>Domestic Antitrust Laws</th>
<th>Government Monopolies</th>
<th>Countertrade Regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brunei</td>
<td>no</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Indonesia</td>
<td>none</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Malaysia</td>
<td>none</td>
<td></td>
<td>countertrade unit ended in 1989</td>
</tr>
<tr>
<td>Philippines</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Singapore</td>
<td>none</td>
<td>telecommunications</td>
<td></td>
</tr>
<tr>
<td>Thailand</td>
<td>Price-fixing and Anti-monopoly Act (1979) (imposes certain controls on restrictive trade practices, but Trade Assoc Act [1966] &amp; Chamber of Commerce Act [1966] provide legal basis for firms to engage in collusive manner in order to boost mkt efficiency)</td>
<td>new laws now being proposed</td>
<td>limited use beginning in mid-1980s for fertilizer, crude oil, and certain machinery and equipment</td>
</tr>
<tr>
<td>United States</td>
<td>Sherman Antitrust Act, Clayton Act, Federal Trade Commission Act</td>
<td></td>
<td>despite policy of non-interference, of 523 U.S. large firms accounting for 60% of U.S. exports in 1984, 5.6% involved countertrade obligations</td>
</tr>
</tbody>
</table>

The EC has a regionwide "competitions policy" which serves to ensure that there are no internal impediments to trade and investment. The aggressive way in which the EC Commission has tried to keep markets open and competitive has been hailed by nonmember countries as reassurance against a "fortress Europe." Under EFTA, private firms were allowed to lodge complaints against others alleged to be practicing such unfair competition. The complaint was then examined to determine whether the industry's practices frustrated trade or not. Member-states also voluntarily tried to remove such situations.

At the national level, among the ASEAN countries only Thailand has a formal Anti-Monopoly Act, as does the United States (Table 2.9). Government monopolies in certain areas continue to exist in ASEAN—even in Singapore—though privatization has been taking place at a rapid rate. Countertrade is an exception to the rule of market-determined trade in the United States and ASEAN, though it is still practiced under certain circumstances.

GOVERNMENT AID TO INDUSTRIES

Governments can encourage or penalize specific activities by a number of fiscal and administrative measures. The result of such action is usually to make the money cost of goods or services higher or lower than the real cost of production, depending on what is being subsidized and what is being taxed (in some cases, it can be argued that the government is dealing with negative or positive externalities). Taxes or subsidies applied to imports or exports will distort the price relationship between domestic and foreign goods, while specific taxes or subsidies applied to particular importable or exportable products will distort the optimum pattern of trade as determined by comparative costs. As a rule, the
more general the policy, the smaller the distorting effect on trade patterns.

In addition to distorting trade patterns, subsidies have a domestic cost as they are financed by taxes. Further, a subsidy to a domestic industry necessarily implies that other domestic industries are directly or indirectly taxed. Not only are labor and capital drawn into the subsidized, noncompetitive industry, but the prices in a subsidized industry are artificially lower. These effects are likely to impact negatively on other industries. Also, possibility of such aid, under the guise of "industry policy," national security grounds, or other forms, is an incentive for industrial lobbying in order to win such support, leading to "directly unproductive activities" (DUP) in the private sector. These DUP activities can be very expensive to the economy, particularly since successful lobbying is generally associated with less-efficient production. The high cost of subsidies in the domestic economy is one of the reasons that the Uruguay Round addressed the issue. Using the GATT as a reason to reduce or eliminate subsidies can ease the pressure felt by governments and policymakers from domestic interest groups.

In terms of assisting specific activities or products, various methods are used by governments. They include: (1) differential rates of taxation or depreciation allowances, and the remission of taxes related to specific activities or products; (2) outright money grants and loans at nonmarket rates; (3) sale by the government of goods or services at differential and less-than-market prices; (4) guaranteed government contracts; (5) government-financed infrastructure or the provision of special facilities (i.e., public housing for the work force, etc); and (6) payroll subsidies.

Even if the intent of the subsidy or tax is not protective, it can often be shown to have a negative effect on other countries' exports to the extent that the tax/subsidy allows the producer to market the goods at home or in competing-partner markets at a lower price than would otherwise have been possible. This result can lead to important implications in a free trade area since distortions in money prices are likely to cause distortions in the proper functioning of the pattern of comparative advantage under regional free trade.

In an integration area, there must be mutual consent regarding the use and extent of government aid to industries. Otherwise the government aid will be a source of tension between the members and may lead to the use of countervailing duties on internal trade.

The GATT includes a subsidies code which tries to create greater international discipline regarding these distortionary practices. The GATT is not only concerned with the trade-distorting effects of this government intervention, but also in any resulting retaliation (which, of course, will be done on a unilateral rather than bilateral basis). The GATT's basic goal is to ensure that government subsidies do not adversely affect the interests of exporting countries and that countervailing measures by importers do not unjustifiably impede trade.

Export Subsidies

Subsidies that are either based on export performance or are contingent upon the use of domestic over imported goods are prohibited by GATT. If an ad valorem subsidy exceeds 5 percent and is deemed to have an adverse impact on other signatories, the dispute settlement body may rule that the member must withdraw the subsidy or remove the adverse effects. This injury test is a key element of the agreement and guidelines are in place for the use of countervailing measures on subsidized imported goods. Developing countries with less than US$1,000 per capita GNP are exempted and other developing countries are given eight years to comply.
In EFTA, the member countries accepted the differences between the member-states and made no attempt to harmonize such aid. Under the basic rule, members were not to maintain or introduce aid to exports of goods to other member-states such as direct subsidies to exporters, currency retention schemes involving bonuses to exports, remission of direct taxes or overcompensation for indirect taxes, differential pricing by government agencies supplying imported raw materials according to whether or not the finished product was to be exported (provided the price charged is less than the world price), subsidized export credit guarantees, subsidized export credits, and subsidization of the cost of obtaining export credit (the long-run cost of loans, for example, had to be fully paid). While other policies were not considered to be inconsistent, a member could object to other forms of aid if it felt that the aid "frustrated the benefits expected from the elimination of trade barriers." The guiding principle was to ensure that government aid did not constitute barriers to trade or promote unfair conditions of competition, e.g., subsidies to import-competing products.

As one of the first steps toward liberalization, Mexico adopted the "Bilateral Subsidies Understanding" with the United States in 1985. This accord stipulated that Mexico would phase out export subsidies in exchange for an injury test in countervailing duty litigation. Also, the CER provided for reduction and eventual elimination of all export incentives for trade within the area including tax privileges for exporters, special loans, and export expansion grants.

Two ASEAN countries also have a bilateral understanding with the United States regarding subsidies. The Philippine government signed an agreement with the United States in 1985 to "take specific steps to eliminate the export subsidy elements where they exist in programs under the Omnibus Investment Code and will eliminate the export subsidy element of export packing credits rediscounted through the Central Bank of the Philippines," and the United States also signed an accord with Indonesia that same year.

The United States and ASEAN countries, except Singapore, engage in some production subsidies, particularly in farming. However, what is relevant to U.S.–ASEAN economic relations is whether these subsidies distort international trade. The United States has imposed numerous countervailing duties over the past decade (179 cases over 1985–1993 period), including duties on extruded rubber thread exports from Malaysia. ASEAN countries have resorted to countervailing duties far less frequently, though Malaysia implemented a law on countervailing provisions in April 1994 and Philippine legislation provides for them (though the Philippines has never used them since joining GATT).

STATE TRADING AND PUBLIC PROCUREMENT

There are two basic kinds of government purchases: state trading (i.e., where the government is an entrepreneur; examples include the case of tobacco or alcohol monopolies) and public procurement (i.e., where the government acts as a consumer). In addition to the potential long-term benefits, governments buy goods from home producers because of their interest in increasing employment and tax receipts, as well as other noncommercial considerations, such as better after-services care, continuity, political clout, and strategic objectives.

Prior to the Tokyo Round of the GATT, a large part of the market for government procurement was closed to foreign producers by means of formal or informal systems of national discrimination in favor of domestic producers. The GATT government procurement code established obligations of nondiscrimination for purchases by specified government entities, including national treatment
<table>
<thead>
<tr>
<th>Country</th>
<th>GATT Agreement on Subsidies</th>
<th>Bilateral Agreements on Subsidies</th>
<th>Sectors Affected by Subsidies</th>
<th>Against Own Exports</th>
<th>Against Foreign Imports</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brunei</td>
<td>none, no pricing schemes or prod. subsidies, no export credits or guarantees</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Indonesia</td>
<td>Signatory United States (1985)</td>
<td>all sectors using petroleum (due to subsidized prices); farmers (subsidies on fertilizer, financial credit, irrigation facilities buffer stock activities, special subsidies for rice to be reduced under UR)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Malaysia</td>
<td>Observer</td>
<td>preferential tax system for auto manufacturers whose products contain a certain domestic level content</td>
<td>includes extruded rubber thread (US)</td>
<td>never resorted to use of countervailing duties; law on countervailing provisions implemented 4/94</td>
<td></td>
</tr>
<tr>
<td>Philippines</td>
<td>Signatory United States (1985)</td>
<td>export sectors (w/equal treatment between domestic &amp; foreign firms)</td>
<td></td>
<td>since joining GATT, never used countervailing duties; legislation found in Section 302 of the Philippine Tariff and Customs Code</td>
<td></td>
</tr>
<tr>
<td>Singapore</td>
<td>Observer</td>
<td>none, no price support schemes or production subsidies, no export credits or guarantees</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Thailand</td>
<td>Observer</td>
<td>some assistance to farmers, e.g., loan assistance (GATT consistent)</td>
<td>include apparel, yarn and no yarn; ball bearings; steel wire rope; carbon steel pipes and tubes</td>
<td>none</td>
<td></td>
</tr>
</tbody>
</table>
Table 2.10 (continued)

<table>
<thead>
<tr>
<th>Country</th>
<th>GATT Agreement on Subsidies and Countervailing Duties</th>
<th>Bilateral Agreements on Subsidies</th>
<th>Sectors Affected by Subsidies</th>
<th>Against Own Exports</th>
<th>Against Foreign Imports</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>Export Enhancement Program, Dairy Export Incentive Program, Mandated Export Sales of Dairy Stock, Sunflowerseed Oil and Cottonseed Oil Assistance Program</td>
<td>numerous cases of countervailing action including 179 cases (22 agr. prod.) between 1/85-6/93 which is the highest no. for any individual country; for ex., against pork from Canada, nonrubber footwear from Brazil, salmon from Norway; steel prod. from EC</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

 gallon and requirements of transparency of the tendering processes. Under GATT, preferential public purchasing is permitted but state trading must be conducted on strictly commercial lines (Article 3(8b) and Article 17).

As part of the Economic and Monetary Union program, the EC has made open public procurement a cornerstone of economic integration, particularly since it constitutes approximately 15 percent of EC GDP. The EFTA and NAFTA countries essentially agreed to give national treatment to suppliers from other member countries. The EFTA experience suggests that once the initial psychological hurdle is overcome, the results can be extremely positive.¹⁷

ASEAN countries agreed to send pre-tender notices to other ASEAN countries when inviting international tenders and to accord each other a 2.5 percent preferential margin not to exceed US$40,000 (Article 7, Agreement on ASEAN Preferential Trading Arrangements, February 1977).¹⁸ While this agreement came into force on 1 January 1979, it appears to be little used.

The United States and Singapore are signatories to the GATT agreement on public procurement, though about 95 percent of U.S. government contracts above the threshold level were awarded to U.S. firms (Table 2.11). The United States does not have a centralized procurement authority and has no state trading company. While Singapore is also quite open in this area, other ASEAN countries having a number of state-trading companies and have relatively restrictive practices in other areas which favor domestic firms.

RECOMMENDATIONS FOR COOPERATION IN INDIRECT TRADE-RELATED MEASURES

The building blocks of economic cooperation tend to take on special significance in the area of indirect trade measures, as harmonization of these oftentimes sensitive areas meet with considerable resistance, particularly with respect to national
<table>
<thead>
<tr>
<th>Country</th>
<th>GATT Agreement on Gov't Procurement</th>
<th>Centralized Agency</th>
<th>State-trading Enterprises</th>
<th>Characteristics of Tendering System</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indonesia</td>
<td>Observer</td>
<td>none</td>
<td>BULOG, Krakatau Steel, Perum Dahama (explosives), Pertamina, and 6 other state-trading enterprises</td>
<td>foreigners allowed to bid for contracts &gt;Rp500 million, but must meet counterpurchase arrangements</td>
<td>foreign joint ventures not allowed to tender for gov't pharmaceutical purchases and are also generally prohibited from competing in generic drug market; in 1989, a countertrade deal by state-owned aircraft co. (IPTN) to supply components worth US$100m in exchange for purchase by Garuda of nine Airbus-planes in 1996-97</td>
</tr>
<tr>
<td>Malaysia</td>
<td>Observer</td>
<td>National Padi and Rice Authority</td>
<td>for smaller projects foreign equity must be less than 30% in joint ventures</td>
<td>as of 4/92, gov't purchases no longer required counterpurchase element</td>
<td>although procurement practices do not discriminate against foreign goods, Phil gov't appeared to favor domestic firms for rice, medicines &amp; infrastructure projects</td>
</tr>
<tr>
<td>Philippines</td>
<td>Observer</td>
<td>Philippine International Trading Corporation; National Food Authority (sole importer of rice, and controls imports of corn and other feedgrains)</td>
<td>foreign suppliers must &quot;qualify&quot; for bidding process by registering w/Ministry of Finance and if foreign equity does not exceed 30%</td>
<td>although procurement practices do not discriminate against foreign goods, Phil gov't appeared to favor domestic firms for rice, medicines &amp; infrastructure projects</td>
<td>although procurement practices do not discriminate against foreign goods, Phil gov't appeared to favor domestic firms for rice, medicines &amp; infrastructure projects</td>
</tr>
<tr>
<td>Singapore</td>
<td>Signatory</td>
<td>none</td>
<td>open, selective and single systems used; open competition accounts for 70% of total number of tenders called (85% when exclude defense contracts)</td>
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</tr>
<tr>
<td>Country</td>
<td>GATT Agreement on Gov’t Procurement</td>
<td>Centralized Agency</td>
<td>State-trading Enterprises</td>
<td>Characteristics of Tendering System</td>
<td>Examples</td>
</tr>
<tr>
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<td>--------------------------</td>
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<td>----------</td>
</tr>
<tr>
<td>Thailand</td>
<td>Observer</td>
<td>none, though tenders governed by various Cabinet and Ministerial rules and regulations</td>
<td>several including Public Warehouse Org., Thailand Tobacco Monopoly, Forestry Industry Org., Fish Marketing Org., Thai Plywood Ltd. and Gov’t Cold Storage Org.</td>
<td>not transparent</td>
<td>domestic suppliers receive a preferential margin of up to 15% (but in practice the selected suppliers will get a margin of up to 10%; however the margin is only 3-5% if they are not subject to the Thai Industrial Standards Institute)</td>
</tr>
<tr>
<td>United States</td>
<td>Signatory</td>
<td>none w/exclusive privileges/rights, but commodity Credit Corp engages in export activities of certain agr. goods</td>
<td>about 95% of gov’t procurement contracts above threshold level were awarded to U.S. firms</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
industries. Faster compliance to the GATT code and extension of these agreements to other indirect subsidies to exporters could be considered.

With respect to government procurement policies, the United States and ASEAN should develop a framework which would eventually allow for open and transparent policies. Under the GATT, procurement of goods and services by central and subcentral governments and government-related entities is to be conducted in a transparent manner under the principles of national treatment and nondiscrimination. Requirements involving technology transfers, minimum local content, and countertrades are explicitly prohibited. To be consistent with GATT, significant changes in the public procurement will thus be required by the United States and the ASEAN economies except Singapore. To this end, cooperation between the United States and the ASEAN countries can help to ensure speedy compliance to the GATT principles. In addition, an agreement to reduce the minimum value of government contracts that could be bid on by foreign companies and to consider joint ventures as domestic firms could also be considered. A commitment to reduce "tying" of foreign aid should also be studied. Among the ASEAN countries themselves, further thought should be given to providing national treatment to all ASEAN firms.

INVESTMENT AND FINANCIAL MEASURES

The important emphasis on trade-related investment measures and financial services at the Uruguay Round testifies to their importance in the new international economy. In fact, international investment and other financial flows have been booming over the past decade, at the same time that there have been changes in technology, reductions in transactions costs, the emergence of new financial instruments and organizations, and new corporate strategies. More than ever, trade flows are being determined by investment. Clearly, any framework of cooperation between the United States and ASEAN should include articles in this area. Below, we consider currency issues, banking access, and investment measures; though not comprehensive, these areas represent key areas of interest.

CURRENCY

Regarding international financial policies, the GATT stipulates that "neither partner shall restrict the export from its territory of convertible currencies or convertible currencies, deposits, or instruments representative thereof, obtained in connection with trade in products and services by nationals, companies and organizations of the other party." Hence, GATT considers the need for convertibility on the current account as an important goal in order to ensure a smoothly functioning international trading system (Table 2.12).

Currency Coordination and Coordination of Economic Policy

If members of an integration area do not allow their currencies to float freely in relation to each other and if they do not wish to see tariff surcharges or quantitative restrictions imposed on intra-area trade in the event of balance-of-payments disruptions, they must coordinate their policies with respect to inflation and employment (e.g., regulation of money supply, and the size and financing of government expenditure). The EFTA experience suggests, however, that such coordination is superfluous in a small free trade area unless exchange rates are internally fixed.

It has been argued that the Economic and Monetary Union in Europe is being pushed by the need to ensure currency stability in order to avoid trade problems. For example, if within the Single Market there are no barriers to trade but one country uses a policy of "competitive depreciation" to out-compete its rivals and spur domestic economic growth, this type of beggar-thy-neighbor policy could lead to retrograde steps in trade via retaliation.
Table 2.12 Currency Issues

<table>
<thead>
<tr>
<th>Country</th>
<th>Determination of For. Exchange Rate</th>
<th>Acceptance of Article VIII, Sec. 2, 3, &amp; 4</th>
<th>Limitations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indonesia</td>
<td>determined freely by foreign exchange market</td>
<td>yes, since 5/88</td>
<td>free allocation/transfer of for. ex., but only licensed for. ex. banks can execute such transactions; 80% of all loans made in for. ex. must be for export activities (as of 1991)</td>
</tr>
<tr>
<td>Malaysia</td>
<td>determined freely by for. ex. mkt.</td>
<td>yes</td>
<td>remittances of more than $10,000m need to have approval (generally for recording purchases which is readily given)</td>
</tr>
<tr>
<td>Philippines</td>
<td>determined freely on for. ex. mkt. w/occ. Central Bank intervention</td>
<td>for. ex. may be freely sold/purchased by Authorized Agent Banks, and exporters no longer required to sell for. ex. receipts to banks</td>
<td>approval required for import/export of &gt;P5,000</td>
</tr>
<tr>
<td>Singapore</td>
<td>determined freely on for. ex. mkt.</td>
<td>yes as of 11/68</td>
<td>loans in excess of S$5 million to nonresidents and to residents for use outside Singapore must have approval of the monetary authority</td>
</tr>
<tr>
<td>Thailand</td>
<td>based on weighted-basket of currencies of Thai’s major trading partners</td>
<td>yes as of 5/90</td>
<td>no</td>
</tr>
</tbody>
</table>

FINANCIAL SERVICES

An important area in trade in services in the contemporary economy relates to banking access and other financial services such as insurance and securities. Liberalization of trade in financial services includes the ability to open bank accounts in the domestic currency, and national or MFN treatment in financial transactions. Unfortunately, financial services were not included in the new GATS accord. In contrast, the agreement to national treatment in financial services under NAFTA is one of the most significant steps in this direction. This agreement will open market access in Mexico while the United States will not be significantly affected. Barriers to entry in the financial services market in the United States are for the most part (except for a few states) problems of differing regulations and standards by states. These regulations confront both domestic and foreign firms. The interstate banking law which restricted interstate transactions has been amended and this should ease market access to both domestic and foreign banks. In Europe, liberalization of financial services was an important part of the EC 1992 program, which has arguably created a more integrated market than the United States itself. Economic and monetary union should enhance financial integration in the EU. As can be seen in Table 2.13, all of the ASEAN countries restrict market access in financial services. Ownership is often limited to minority positions.
### Table 2.13 Financial Services

<table>
<thead>
<tr>
<th>Country</th>
<th>Insurance</th>
<th>Securities</th>
<th>Banking</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indonesia</td>
<td>social insurance from state-owned enterprises only; other insurance from domestic or joint venture only (except where not available locally)</td>
<td>not bound to open this sector under GATS</td>
<td>100% owned foreign banks already present may open only one new branch in major cities, all others must be in form of joint venture; expatriate positions limited to executive positions</td>
</tr>
<tr>
<td>Malaysia</td>
<td>joint ventures only minority position (maximum 30%) for existing firms; new entry limited to equity participation in existing locally incorporated companies</td>
<td>equity participation is a maximum of 30%; foreign entry is limited to recognized foreign stockbroking companies</td>
<td>presently no new banks or branches allowed (including ATMs); must incorporate locally (1994) only 40% of bank loans to foreign controlled companies must be provided by locally incorporated banks; soliciting, advertising, and acceptance of deposits in Malaysia are not allowed</td>
</tr>
<tr>
<td>Philippines</td>
<td>new entrants must be domestically incorporated; 40% maximum foreign ownership</td>
<td>na</td>
<td>30% of voting stock 40% with presidential approval (expect change in 1994); no investment banking allowed</td>
</tr>
<tr>
<td>Singapore</td>
<td>no new companies allowed (domestic or foreign)</td>
<td>foreign stockbroking companies can establish only as nonmembers of the Stock Exchange of Singapore; representative offices cannot conduct business or act as agents</td>
<td>freeze on number of full banking licenses (both domestic and foreign); foreign banks cannot open new branch offices, relocate existing branches, or freely operate off premise ATMs</td>
</tr>
<tr>
<td>Thailand</td>
<td>25% maximum shareholding in Thai insurance company</td>
<td>citizenship required for license; 49% maximum foreign ownership</td>
<td>no branches allowed for current foreign banks (including ATMs) except some outside of Bangkok; 25% maximum share in any locally incorporated bank; offshore banking units opened and are up able to make loans using funds from abroad</td>
</tr>
<tr>
<td>United States</td>
<td>each state has own laws and insurance regulators; some states refuse access, require citizenship for board members, require U.S. deposits</td>
<td>na</td>
<td>some states prohibit establishment of a branch and an agency by foreign banks; others allow establishment of an agency but not a branch; Foreign Bank Supervision Enhancement Act requires Federal Reserve Board approval of all foreign banks applications for branches, agencies, and representative offices</td>
</tr>
</tbody>
</table>
INVESTMENT

One of the most important changes in international agreements is the inclusion of measures to alleviate the trade-restrictive and trade-distorting effects of a country's laws regarding foreign investment. Particularly during the recent Uruguay Round, the GATT has endeavored to reduce trade-related investment distortions and stressed the importance of national treatment for direct investment. However, more general issues of investment are outside the realm of trade-related investment measures and, hence, the jurisdiction of the GATT. Nonetheless, given the important role of international investment flows in the health of the global economy and its direct and indirect links to the trading system, countries have seen the need to promulgate investment treaties, if only on a bilateral basis. One form of agreement is the "bilateral investment treaty," in which important guidelines and common efforts toward national treatment of foreign investment are treated. The United States and Thailand signed such a treaty in 1966 giving U.S. firms national treatment in Thailand.20

Performance Requirements

Bilateral investment treaties often include some type of performance requirements such as minimum export levels, domestic content level requirements, and technology transfer requirements, which can have significant impacts on trade. The Uruguay Round of the GATT dealt with this issue for the first time and specified that trade-related investment measures (TRIMs) that restrict the amount of imported materials or foreign exchange depending upon export performance, or that specify the amount of domestic content or exports required for access to the domestic market, are inconsistent with Article III or Article XI of GATT. Developing countries are allowed to temporarily deviate from the provisions.

EFTA had minimum guarantees concerning direct investment unrelated to trade. This is a step backward for most countries, but represents a minimum step necessary in a free or freer trading community. NAFTA, in contrast, has taken the bold move of banning all such performance requirements.

Double Taxation Agreements

How a country taxes foreign investment has important implications for the attractiveness of that country as an investment site. However, accounting questions arise as to how taxes should be levied on bilateral investment flows. For example, if a foreign affiliate is taxed on profits in the host country and then again when these profits are repatriated to the investing country, the firm will effectively be "double taxed." Moreover, issues of taxing other factors of production, e.g., labor, are important. Hence, in order to avoid double taxation and allow for an equitable distribution of revenues, double-taxation agreements can be signed between countries, either as part of a bilateral investment treaty or as a freestanding agreement.

The attraction of investment as a development policy is becoming increasingly important to ASEAN. In addition to national investment measures, the ASEAN countries are finding that subregional, regional, and global approaches to investment cooperation—e.g., through common investment codes, regional bilateral investment treaties, and construction of "growth triangles"—offer important new opportunities.21

RECOMMENDATIONS FOR ENHANCING COOPERATION IN FINANCIAL AREAS

As Chapter Three by Konan and Chia gives an in-depth analysis of these issues and specific recommendations for cooperation, we limit ourselves here to mention one area in which the United States and ASEAN could engage in effective cooperation:

The United States and ASEAN should establish a comprehensive investment framework agree-
ment, allowing for common regional and national policies. Between the United States and ASEAN countries, a few basic agreements would do much to facilitate investment. The investment code being considered by APEC is an important first step towards reducing the uncertainties faced by investors. Double-taxation agreements have still not been concluded between the United States and several ASEAN partners. Further, any harmonization of investment rules and regulations within ASEAN would also allow investors to more easily set up industrial networks. Thus, an important first step would be to consider the standardization of investment incentives among the ASEAN countries to avoid distortions and allow for the most efficient allocation of investment flows.

AUXILIARY MEASURES

While "auxiliary measures" is a broad category and is becoming even larger as new modes of economic interaction are developed, and as means to distort these new modes are devised, we concentrate here on several critical areas in U.S.-ASEAN economic relations namely, intellectual property rights, dispute settlement mechanisms, infrastructural considerations, environmental agreements, and labor-related issues. Arguably the most important of these topics are intellectual property protection and the environment, which are analyzed at length in Chapters Four and Five, respectively.

INTELLECTUAL PROPERTY RIGHTS (IPR)

The basic international agreements on IPR include: (1) Paris Convention for the Protection of Industrial Property of March 29, 1883 as revised at Stockholm on July 14, 1967; (2) Berne Convention for the Protection of Literary and Artistic Works (Paris 1971); (3) Geneva Convention for the Protection of Producers of Phonograms (50 years); (4) International Convention for the Protection of New Varieties of Plants, 1988 or the International Convention for the Protection of New Varieties of Plants; and (5) 1991 trademark registration and protection, and patents. Often, the highly-confrontational disputes that surround the IPR issue are not related to laws per se, but rather to the lack of enforcement of such laws. Hence, agreements in these areas relate not only to formal legislation, but also to their implementation.

As in the case of investment, intellectual property protection is gaining importance in international commercial policy, and in U.S.-ASEAN economic cooperation in particular. For example, while U.S.-ASEAN economic relations tend to be solid, an important area of conflict has been regarding legislation and enforcement of intellectual property protection in the ASEAN countries. In Chapter Four, LaCroix gives a detailed view of the status quo of intellectual property protection in ASEAN and North America, identifying sources of contention and delineating recommendations for mutually-beneficial solutions.

DISPUTE SETTLEMENT

The dispute settlement system of the GATT emphasizes the importance of consultations in resolving disputes. Under GATT, a member must enter into consultations within 30 days of a request for consultations from another member. If there is no settlement after 60 days from the request for consultations, the complaining party may request the establishment of a panel. When consultations are denied, the complaining party may move directly to request a panel (which is generally composed of three members who are not party to the dispute). The parties may voluntarily agree to follow alternative means of dispute settlement. A Dispute Settlement Body may decide not to accept the report of the panel or deal with appeals.

In 1987, the United States and Mexico signed a framework agreement concerning "principles and procedures for consultations regarding trade and investment relations." The agreement provides a consultative mechanism concerning bilateral trade and investment relations, including opportunities
and problems. Discussions and consultations should occur within 30 days of written requests. According to this framework agreement, every effort should be made to settle disputes at the working level, but either party may request a review at a higher level. If the dispute is not resolved within 30 days of the first meeting, either party may seek another means of settlement (e.g., through GATT).

A "Memorandum of Understanding" has been signed by the United States on the one hand, and the Philippines, Singapore and the governments of ASEAN. These call for consultation and dispute resolution on trade and investment issues between the groups.

ENVIRONMENTAL AGREEMENTS

It has become accepted in the past decade that a nation's policies regarding environmental issues is of international concern. Emissions from automobiles and factories, excessive deforestation, and dumping of residential and industrial wastes into waterways and bays clearly have regional if not global impacts. Further, the degree of environmental protection a country maintains can also affect its trade as the short-run direct costs to reduce pollution for firms can be high. This cost can reduce the competitiveness of its firms in the global marketplace or encourage its firms to move production to other countries where the environmental standards are lower.

NAFTA is the first integration agreement to specifically deal directly with environmental concerns. The Agreement attempts to prevent the establishment of "pollution havens" by requiring adherence to international standards and allows environmental evidence to be presented in a trade dispute. It also established a North American Commission on the Environment which could be an opening for more far-reaching reforms. The explosive debate over the environment during the NAFTA negotiations made it clear that future agreements with the United States will also have to deal with this issue.

With the signing of the Singapore Resolution on Environment and Development of 1992, the ASEAN countries have also adopted a cooperative approach to environmental issues. This measure includes greater information and data exchange, cooperation in setting basic environmental quality standards, and development of joint projects. Additionally, cooperation in environmental issues has become a priority area with the ASEAN Dialogue Partners.

Environmental cooperation is moving forward in both the intra-ASEAN and U.S.–ASEAN contexts. As agreed to in the Memorandum of Understanding between ASEAN and the United States in August 1992, a framework for the Environmental Improvement Program (IEP) is now being formulated. In Chapter Five of this volume, Montes takes up the issue of environmental protection in ASEAN and provides a comprehensive, analytical treatment of the situation and considers means by which the United States and ASEAN can jointly reach resolutions to existing problems.

LABOR

Basically there are two kinds of labor laws: the first set deals with labor mobility across national borders, and the second set includes domestic labor laws. Both impact on trade and investment in various ways but are not dealt with under GATT. Labor issues tend to be extremely sensitive and are treated only generally in most integration agreements.

Labor Mobility

With respect to mobility, temporary entry for business persons is necessary to provide easier entry for DFI/professional workers and exporters. Under NAFTA, no employment authorization is needed for such entries. The United States and the Philippines also have an agreement (signed in 1955) allowing
entry to traders and investors. The Treaty of Amity and Economic Relations between the United States of America and the Kingdom of Thailand signed in 1966 also allows entry for traders and investors.

**Domestic Labor Laws**

Domestic labor laws can also affect the competitiveness of a country's exports. Minimum wage legislation and protection of workers' rights, for example, can raise the cost of domestic labor, resulting in higher production costs and reduced competitiveness. These issues were hotly debated in NAFTA, as fears of U.S. firms moving to Mexico to take advantage of cheaper labor or U.S. firms being unable to compete with Mexican firms that employ lower-paid workers became a major issue. To examine such issues, the NAFTA agreement established a commission. However, recent frictions between the United States and certain ASEAN countries in this area in the early 1990s suggest that memoranda of understanding will be developed.

**RECOMMENDATIONS FOR ENHANCING COOPERATION IN AUXILIARY MEASURES**

As noted above, Chapters Four and Five in this volume develop specific recommendations for improving U.S.–ASEAN economic cooperation in intellectual property rights and the environment. As was the case with financial measures, we outline a few of these recommendations here:

**Develop an effective program for the protection of intellectual property rights.** The ASEAN countries have made significant progress in establishing laws in this area, although enforcement remains weak in some countries. There also remain areas of controversy in U.S. patent laws. Further movement towards an international standard will be important. The ASEAN countries should study the possibility of a joint patent office modeled after the European Patent Office, which has generated millions of dollars of savings.

Develop means to enhance understanding, consultation, and cooperation in social areas. Disagreements and frictions between the United States and ASEAN with respect to various social issues have been increasing in importance and, perhaps, pose the most serious problems in U.S.–ASEAN relations. An agreement could be made which would recognize different social policies in each nation and the possibility for concern by other nations regarding these domestic policies. However, each country would pledge to address these issues through political and other diplomatic means, rather than through various types of economic sanctions.

**CONCLUSION**

The United States and ASEAN are becoming increasingly dependent on the international marketplace for economic growth and development. ASEAN constitutes a rapidly growing market for U.S. exports and a lucrative host region for its foreign investments; at the same time, the United States remains the most important market for ASEAN exports of manufactures and a key source of overseas capital. Hence, it is in the interest of all parties to work to reduce barriers to trade and investment at the subregional, regional, and global levels, a goal that has become more difficult to attain as obstacles become less transparent and more numerous. While the Uruguay Round was a great success in stemming the tide of increased protectionism and segmentation of the world marketplace, much remains to be done. In particular, protectionism in cutting-edge and other sensitive areas—e.g., strategic industries, "social" issues, and structural impediments to trade—has been the source of greatest frictions between the United States and ASEAN. Given the extremely diverse nature of commercial policy regimes, the study of actual international trade and trade-related activities is unreasonably complicated and confusing.
This chapter attempted to review the status quo of "basic" trade arrangements in the global marketplace, with the goal of identifying important impediments to economic interchange. The following chapters of this volume seek to explore in more detail several key areas of cooperation presenting great potential for the enhancement of U.S.–ASEAN economic relations.
NOTES

1. In December 1994, the heads-of-state of the NAFTA countries formally agreed to begin negotiations for Chile's accession. However, because Chile is much smaller than Mexico, Chile's membership in NAFTA should not cause the same sort of extensive public debate as did Mexico's.


5. It should be noted, however, that both Australia and New Zealand are net exporters of agricultural items; hence, their incentive to protect is less than, say, in the case of EFTA or the EC.


7. Trade deflection occurs in a free trade area when external tariff disparities facing nonmembers provide an incentive for nonpartner countries to export through the lowest-tariff member-state.


13. For a detailed analysis of the costs of these indirect trade restrictions for Europe, see Paolo Cecchini. 1988. The Costs of Non-Europe. Luxembourg: Commission of the European Communities.


15. This list was taken from Curzon (1974).


21. Existing national, regional, and multilateral policies, as well as recommendations for improvement are considered by Denise Konan and Chia Siow Yue in "U.S.–ASEAN Investment Policies and Prospects for Investment Cooperation," Chapter Three of this volume.


CHAPTER THREE

DIRECT FOREIGN INVESTMENT POLICIES IN ASEAN AND THE UNITED STATES: OPPORTUNITIES FOR DEVELOPING NEW INVESTMENT CODES

Denise Eby Konan
Chia Siow Yue

Southeast Asia has become among the most attractive investment locations in the developing world over the past decade. As was noted in Chapter One, this remarkable economic growth within the region was supported, in part, by inflows of capital and technology through direct foreign investment (DFI). Export-oriented multinational enterprises (MNEs) have enhanced openness among the ASEAN economies and comprise an increasing portion of regional trade. Thus if the goal of unilateral liberalization and the ASEAN Free Trade Agreement (AFTA) is to foster regional economic efficiency and enhance trade and investment linkages, an assessment of how policies regarding direct foreign investment affect these objectives is important.

Investment measures have received considerable scrutiny in other negotiating fora such as the Negotiating Group on Trade-related Investment Measures (TRIMs) in the Uruguay Round, the North American Free Trade Agreement (NAFTA), and the Asian Pacific Investment Code (APIC). While some progress toward greater cooperation in this area has resulted in substantial liberalization and harmonization of regional investment regimes. There seems to be a willingness to extend and formalize cooperation in investment policy. Inflows of DFI into the ASEAN region remain distorted by various investment performance requirements and incentive programs. Thus while the prospect for a comprehensive U.S.–ASEAN agreement on investment measures appears promising, it is neither automatic nor inevitable.

In this paper we consider the desirability and likelihood of an accord on investment measures in U.S.–ASEAN negotiations. It is argued that there is scope for at least limited cooperation to liberalize investment policies within the region. We begin by discussing the complexity of issues concerning investment measures, focusing on the rationale...
behind these measures and the associated costs and benefits. We then consider specific investment incentives and performance requirements of the ASEAN countries, followed by a review of the evidence regarding the impact of investment measures on inward DFI within ASEAN. The legal framework for investment in the United States is presented in the next section, while regional and multilateral agreements that have dominion in ASEAN are discussed thereafter. Finally, we address the forms that a prospective agreement might take.

**ECONOMIC IMPACT OF INVESTMENT MEASURES**

While much has been written about investment measures,² we keep the analytical treatment as brief as possible so as to develop the necessary framework. Nonetheless, before examining the prospects for cooperation of investment measures and policies between ASEAN and the United States, a brief exploration of the motivations for their existence is in order.

Investment measures are a pervasive component of broader commercial policy in most countries; the ASEAN region is no exception. National DFI policies have positive investment incentives on the one hand and negative restrictions and performance requirements on the other, so that the net incentive effects are not always clear. Investment incentives can be subdivided into fiscal incentives, other financial incentives, and nonfinancial incentives. Restrictions and performance requirements include DFI screening; limits on foreign ownership by level, investment modality, and sectors and activities; restrictions on transfers and remittances of capital funds and incomes; and performance requirements pertaining to local content, local employment and training, technology transfer, research and development activities, and exports. The various measures are designed to foster diverse goals such as development through import substitution, the transfer of foreign technology, accumulation of capital, local employment and human capital enhancement, easement of balance-of-payments pressures, and export expansion. In this context, the ASEAN governments may be reluctant to dismantle their investment measures without consideration of appropriate changes in broader policy regimes.

Incentive schemes often accompany investment restrictions in attempts to attract and yet control DFI. Within ASEAN there is a proliferation of investment inducements, ranging from tax holidays and accelerated depreciation allowances to outright subsidies. Case study evidence tends to contest the belief that incentives significantly influence the decision to invest abroad as MNEs appear to be more concerned with broader macroeconomic factors.³ Nonetheless, incentives may have an influence on the final selection of plant location at the margin. Studies observe that competition among potential host countries is most notable in "footloose" industries with multiple alternative comparable-cost production sites.⁴ To the extent that ASEAN governments compete for investment, incentives will tend to reduce welfare in the region by shifting the benefits of DFI from the host country to the investor.

Local control over "rents" (i.e., excess profits) from indigenous resources is also a primary motivation for investment measures. Rent-seeking aspects of DFI in certain industries have been examined in great detail by economists.⁵ It is risky to invest in foreign markets for a variety of reasons and local firms have natural advantages over MNEs such as knowledge of local business and government practices, local networks of suppliers, and other cultural barriers. Hence, firms will only engage in DFI if they possess unique firm-specific advantages that allow them to outcompete the local competition. These firm-specific assets are often intangible, such as patents, copyrights, management skills, and production processes, and thus may be simultaneously employed in multiple locations. MNEs arise, in part, because it is difficult to trade intangible assets at arms length. As firm-specific assets
are not readily available to potential competitors, it follows that MNEs operate within imperfectly competitive markets.

In this framework, investment measures may be reasonable strategic policies in an inherently second-best setting. If MNEs have market power, then governments could potentially redistribute part of the surplus rents from MNEs to its residents. For example, in an industry with scale economies, a production-increasing subsidy may lower a firm's average costs and increase the firm's market share relative to rival producers. To the extent that profits are retained domestically, the host country may gain. In addition, foreign capital may also be attracted to high domestic returns in protected industries. DFI that arises to jump tariff barriers may be welfare-worsening as it increases output in a presumably inefficient sector. In a model of DFI in protected industries, Rodrik demonstrates that export-performance requirements may offset this effect by essentially forcing foreign investors toward world prices.

In practice, however, it is exceedingly difficult to implement strategic investment measures which achieve desired outcomes. Policy results depend not only on the nature of market imperfections but also on the reaction of other firms and governments. Potential rent-shifting gains are dissipated by systemic inefficiencies and the rent-seeking behavior which accompanies investment measures. Moreover, even in imperfectly competitive industries, there may exist pro-competitive gains from investment liberalization. Most economists argue that investment measures have a tendency to reduce welfare in both the home and host countries.

This case has been promoted by governments in developed-market economies seeking to improve access of their firms to foreign markets. As a group, developing-country governments, however, remain largely unconvinced. They argue that investment measures are legitimate within the broader context of social and economic development. Their primary fears are that externally-determined disciplines imposed on their domestic investment policies will result in a loss of national sovereignty and control over local resources, suboptimal levels of technology transfer, and balance-of-payments concerns.

The ASEAN countries share sympathies with both sides in this debate. In the 1980s, investment policy liberalization was in vogue amongst ASEAN governments as an easy way to promote economic growth by enhancing domestic capital formation and technology diffusion. This common approach resulted in a regional convergence of investment performance requirements and incentives. Yet, important distortionary investment policies remain in practice. For example, in the interest of sovereignty and control of domestic resources, local equity and employment requirements are prominent in ASEAN nations (discussed below). Such performance requirements tend to alter location and production decisions of MNEs. In competition to attract DFI, the ASEAN member-state investment programs influence investment locations and lower the regional benefits that DFI provides. While issues of contention remain, however, the prospect is good for a comprehensive U.S.–ASEAN investment agreement.

**DIRECT FOREIGN INVESTMENT POLICIES IN ASEAN**

Despite inherent ambiguities about the actual impact of specific investment measures in ASEAN, there are strong economic reasons to exercise caution in their use. Recognizing this, the ASEAN region has maintained a highly favorable stance towards DFI. In this section we provide a brief review of the investment policies in the ASEAN countries.

**HISTORICAL OVERVIEW**

Until the mid-1980s, the ASEAN countries showed wide diversity in policies and attitudes
Box 3.1: Investment Reform in ASEAN in Recent Years

As history and motivations for liberalization differ across ASEAN members, important distinctions in national policies remain. As part of Singapore's active encouragement of DFI, the Economic Expansion Incentive Act of 1985 and a copyright law of 1986 provided inducements for DFI to high-technology sectors. Few performance requirements, fiscal incentives, well-developed infrastructure, an open trading environment, political stability, and a one-stop investment information center also support investment inflows. Singapore is consistently ranked as one of the most attractive investment locations in the world by business surveys such as Business Environment Risk Information.

In contrast, Malaysia tends to discourage DFI by imposing restrictions on foreign equity participation and channeling investment into export processing zones. The New Economic Policy of 1970 required a redistribution of equity participation to include a minimum of 30 percent for indigenous Malaysians (bumiputra) and a 30 percent maximum for foreign investors. Declining prices for commodities such as oil, tin, and rubber in the 1980s encouraged Malaysia to significantly liberalize its investment policy. Yet, some restrictions on foreign ownership apply if a company exports less than 50 percent of its production.

Historically, Philippine legislation has provided various inducements to DFI. Since the 1950s, significant incentives have been offered to firms operating in preferred activities. In 1987, the Omnibus Investment Code replaced existing inducements with general fiscal incentives on par with those in other Asian countries. The new Ramos regime also embarked on deregulation, liberalization, and privatization to attract investments and stimulate the stagnating Philippine economy. Restrictions on foreign equity participation were greatly relaxed in 1991 by the Foreign Investment Act.

Investment policy liberalization has been most dramatic in Indonesia, which is rich in oil and natural resources. Investment policies historically promoted the public sector and import-substitution manufacturing while limiting DFI. As in Malaysia, falling oil and commodities prices resulted in reforms in Indonesian investment policy. Since 1984, the Indonesian government has taken wide-ranging measures toward deregulation and liberalization. A key change in DFI policy was the removal of the tax holiday for investors in 1984, accompanied by simplified and lower income tax rates, value added taxes, property taxes, and withholding taxes, as well as the introduction of accelerated depreciation allowances. In the following years, further reforms were introduced including reductions in import tariffs, relaxation of foreign equity restrictions and divestment requirements, liberalization of the financial sector, and replacement of the investment priority list of sectors with a trimmed-down negative list. Finally, sweeping liberalization measures were announced in June 1994—restrictions on 100-percent foreign ownership and the minimum capital requirement were removed and the negative list was once again shortened. Yet, Indonesia still excludes DFI from important sectors such as retail trade, communications, and various manufacturing industries, and national treatment is generally not granted to MNEs.
Box 3.1: Investment Reform in ASEAN in Recent Years (continued)

While actively encouraging foreign joint ventures in energy and industrial sectors, Thailand attempts to control DFI through a wide range of measures such as ownership restrictions and technology transfer requirements. Thailand’s basic legislative framework of 1954 remains unchanged. DFI inflows, which have recently been high relative to the ASEAN average, may be attributed to low-cost production, infrastructure development, as well as promotional efforts. The Thai government has also been active in encouraging DFI outside of the Bangkok metropolitan area in order to promote regional development.

toward DFI, which reflected different historical experiences and priorities (see Box 1: Investment Reform in ASEAN in Recent Years). Singapore has had the most liberal DFI regime, having encouraged DFI since independence in 1959 through active government intervention, while Indonesia and the Philippines were much more restrictive. In the post-1985 period, the more inward-looking ASEAN countries embarked on major reforms to deregulate, liberalize, and privatize their economies to promote efficiency and stimulate economic growth. The switch to more liberal DFI policies reflects the growing recognition of the contributions that DFI can make to foster economic growth, diversification, export competitiveness, technological upgrading, and human resource development. A remarkable level of regional convergence of investment rules and incentives has emerged from these largely unilateral reforms.

While investment regimes continue to vary, DFI policy liberalization in the ASEAN region are generally characterized by the following. First, the policy environment has become more hospitable towards private enterprise, foreign investment included, as governments sought to limit their intervention in the economy through deregulation and privatization and focused more on the use of general economic policies to guide private investment decisions.

Second, the administration of DFI has been streamlined resulting in simpler and speedier investment approval procedures, greater transparency in applying investment incentives and performance requirements, and better coordination among relevant government agencies in policy formulation and implementation. Some countries decentralized decisionmaking to regional bodies so as to speed up the approval and implementation process.

Third, the DFI incentive/disincentive package has shifted towards positive incentives and away from negative restrictions and performance requirements. Existing DFI legislations have been amended and more liberal interpretations of their restrictive elements allowed. Incentives are increasingly directed towards promoting competitive industries and activities, with corresponding less reliance on protective and restrictive measures. Notably little liberalization has occurred, however, in some of the performance requirements most frequently employed such as employment and technology transfer requirements.

Fourth, the liberalization trend has pushed towards greater equality in policy treatment of foreign and domestic investors. As part of the reform process, incentives tend to apply more equally to both foreign and domestic investors, with
<table>
<thead>
<tr>
<th></th>
<th>Brunei</th>
<th>Indonesia</th>
<th>Malaysia</th>
<th>Philippines</th>
<th>Singapore</th>
<th>Thailand</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>One-stop agency</strong></td>
<td>Ministry of Industry &amp; Primary Resources</td>
<td>Investment Coordinating Board (BKPM)</td>
<td>Malaysian Industrial Development Authority (MIDA)</td>
<td>Board of Investment</td>
<td>Economic Development Board</td>
<td>Board of Investment</td>
</tr>
<tr>
<td><strong>Restricted sectors</strong></td>
<td>na</td>
<td>Annual negative list.</td>
<td>Foreign equity participation in manufacturing governed by level of exports.</td>
<td>Foreign ownership prohibited in retail trade, mass media, rural banking &amp; restricted in some other sectors.</td>
<td>No restrictions, except for national security purposes.</td>
<td>Alien Business Law prohibits and restricts FDI in certain activities.</td>
</tr>
<tr>
<td><strong>Joint venture/capital requirements</strong></td>
<td>JV encouraged, espec. in export-oriented industries &amp; supporting industries.</td>
<td>100% foreign equity allowed. JV requires 5% Indonesian equity. For listed firms on local stock exchange, foreign equity maximum of 49%.</td>
<td>100% foreign equity allowed for projects that export minimum 80%. Foreign equity ratios subject to performance requirements.</td>
<td>Majority equity allowed for projects not in negative list.</td>
<td>No restrictions on 100% foreign ownership except in mass media, public utilities, telecommunications &amp; domestic financial services.</td>
<td>Foreign equity restrictions in Alien Business Law. 100% foreign ownership allowed in BOI-promoted projects.</td>
</tr>
<tr>
<td><strong>Local content requirements</strong></td>
<td>na</td>
<td>For some industries</td>
<td>For some industries</td>
<td>For some industries</td>
<td>None</td>
<td>For some industries</td>
</tr>
<tr>
<td><strong>Employment restrictions</strong></td>
<td>Employment passes liberally issued.</td>
<td>Restricted, depending on local availability.</td>
<td>Restricted, depending on local availability.</td>
<td>Restricted, depending on local availability.</td>
<td>Employment passes liberally issued.</td>
<td>Restricted, depending on local availability.</td>
</tr>
<tr>
<td><strong>Import protection</strong></td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>None</td>
<td>Yes</td>
</tr>
</tbody>
</table>
### Table 3.1 (continued)

<table>
<thead>
<tr>
<th>Import duty relief for machinery, equipment, materials</th>
<th>Brunei</th>
<th>Indonesia</th>
<th>Malaysia</th>
<th>Philippines</th>
<th>Singapore</th>
<th>Thailand</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>None</td>
<td>Yes</td>
</tr>
</tbody>
</table>

**Tax incentives**

<table>
<thead>
<tr>
<th>Brunei</th>
<th>Indonesia</th>
<th>Malaysia</th>
<th>Philippines</th>
<th>Singapore</th>
<th>Thailand</th>
</tr>
</thead>
</table>

many of the discriminatory performance requirements being relaxed.

The ASEAN governments use investment incentives and disincentives (or trade-related investment measures in GATT terminology) to promote DFI inflows; channel DFI into priority sectors, activities, and locations; and improve the DFI linkages to the domestic economy (Table 3.1). The investment incentives help to improve the investment climate and offset the disincentive effects of restrictions and performance requirements imposed for political and social reasons. Many restrictions and performance requirements are linked to incentive awards.

FOREIGN INVESTMENT POLICIES WITHIN ASEAN

Investment Promotion Framework

All of the ASEAN countries have established investment boards to promote inward DFI and monitor DFI performance. Some of these boards act as one-stop centers to provide speedy investment approval and investment services, and minimize conflicting decisions and interpretations of rules and regulations between government agencies. Not all countries have specific legislations pertaining to DFI.

Singapore’s Economic Development Board (EDB) has been outstanding in its ability to process investment queries and applications in record time, and in coordinating policies and investment services of various government agencies. EDB has established investment offices in a large number of countries and organized regular investment missions and seminars. In the area of trade and financial services, promotion and monitoring activities are undertaken by the Trade Development Board and the Monetary Authority of Singapore, respectively. Singapore has no specific law on foreign investment. Foreign enterprises are subject to the same legal requirements as local enterprises and must be registered under the Business Registration Act for sole proprietorships and partnerships or under the Companies Act.

Malaysia has no foreign investment law and all foreign enterprises must be registered under the Registration of Business Ordinance and the Companies Act. Institutions administering DFI are the Malaysian Industrial Development Authority (MIDA) and the Ministry of Trade and Industry (MITI). Fiscal and financial incentives are determined at the federal level, while the state governments control land matters, including development and management of industrial estates and export processing zones. Investment incentives were introduced in 1958 under the Pioneer Industries Ordinance, followed by the 1968 Investment Incentives Act, the 1971 Free Trade Zones Act, and the 1975 Investment Incentives Act and Customs Act. The 1975 Industrial Coordination Act was aimed at industrial promotion and rationalization, and the 1986 Promotion of Investments Act extended incentives to small and medium-scale industries and tourism and hotel projects. A Foreign Investment Committee monitors investment policies at the national level. MIDA acts as a one-stop agency for foreign investors, while investment centers provide investment services at the state level.

The oil-sultanate of Brunei established its Economic Development Board in 1975 and enacted the Investment Incentives Act in an effort to diversify the economy from its heavy dependence on oil. The Ministry of Industry and Primary Resources was formed in 1989 to promote industrial development and provides a one-stop agency for investment information and assistance. In Indonesia, the Investment Coordinating Board (BKPM) is responsible for investment applications, approvals, and investment facilities, but investments in energy and mining and export processing zones are handled by separate authorities. DFI-related laws and regulations are found in enactments in 1967 and 1970, as well as subsequent government regulations, presidential
decrees, ministerial regulations, and ministerial decisions.

The Philippines has had a plethora of foreign investment laws and regulations. More recent laws and regulations pertaining to DFI are the 1991 Foreign Investment Act liberalizing restrictions and performance requirements, and legislation providing for foreign private investment in infrastructural development under the built-operate-transfer (BOT) scheme. The Board of Investment and the Export Processing Zone Authority screen investments and administer investment incentives.

In Thailand, DFI is governed mainly by the Investment Promotion Act of 1977 and the Alien Business Law of 1972. The former introduced investment incentives, while the latter established categories of business activities under which foreign businesses are prohibited, permitted only with Board of Investment (BOI) promotion, or implemented only with permission.

Fiscal and Financial Investment Incentives

To attract DFI, all of the ASEAN governments provide investment incentives in some financial form such as tax holidays, accelerated depreciation and investment allowances, export incentives, preferential loans, and subsidies. Often, these incentives are offered to offset the negative effects of various performance requirements. While investment incentive programs may be rational for an individual country given the policies of its neighbors, competition for DFI has resulted in broadly similar investment inducement programs amongst the ASEAN countries. As a result, some of the benefits of investment are being shifted from the region to MNEs in the form of concessions, and this is likely to be welfare-reducing for the region as a whole.

Fiscal incentives are widely used in ASEAN to promote and control DFI. The most controversial of these is the income tax holiday as its effectiveness in attracting DFI is debatable and host-country benefits of DFI are eroded. Indonesia removed its tax exemption incentive in 1984 without much loss in DFI. Other ASEAN countries employ tax holidays as a key incentive for pioneer firms and other favored investors. Corporations of pioneer status in Brunei are granted a tax holiday for 2–5 years. In the Philippines, full income tax exemptions are available for 4 and 6 years for nonpioneer and pioneer firms, respectively. Thailand exempts corporate income taxes for pioneer firms for 3–8 years depending on performance requirements. Pioneer firms in Malaysia enjoy a favorable profit tax rate of 10 percent for five years, and in Singapore, pioneer firms qualify for a 31 percent tax exemption on profits for 5–10 years.

Each ASEAN member has agreements to avoid double taxation with their major investing partners, including its ASEAN neighbors. Indonesia and the Philippines have a double taxation agreement with the United States. Import duty remissions and value added tax waivers are granted by most ASEAN nations. In Malaysia and Indonesia, duties on most machinery, equipment, and raw materials are fully exempt. In Thailand, import duty exemptions are 50 percent for machinery and equipment, and up to 90 percent on raw materials.

Other tax exemptions within ASEAN tend to promote specific sectors or activities. For example, Malaysia, the Philippines, and Singapore provide generous tax incentives for the domestic establishment of regional headquarters. Interest on approved foreign loans is exempt from taxes in Brunei. Tax deductions for research and development and labor training expenses are especially generous in Malaysia. Additional concessions are generally granted to firms to encourage investment expansion and exports. All ASEAN countries, except Indonesia, provide tax concessions to firms for initial capital expenditures.
Ownership Restrictions

The ASEAN countries impose varying degrees of restrictions on foreign ownership of land, natural resources, and corporate equity, with restrictions in the latter occurring particularly in "strategic" sectors of the economy. Ownership restrictions are linked to issues of national sovereignty and security, and safeguarding the more vulnerable sectors of the economy from external competition. There has been significant relaxation of ownership restrictions in recent years, in response to changing perceptions of DFI costs and benefits.

Singapore and Malaysia tend to have less restrictive rules than the other ASEAN members regarding land ownership. In Singapore, industrial and commercial land is readily available, and there is no ownership restriction on condominiums and high-rise apartments; but approval is needed for other residential properties. In Malaysia, land ownership is under state jurisdiction and rules on foreign ownership vary among the many states. Generally, no restrictions are imposed on land ownership for industrial projects, while residential properties require approval. In Brunei, Indonesia, the Philippines, and Thailand, foreign ownership of land is prohibited by law or the constitution, and long-term land lease arrangements are the norm. In Indonesia, 30-year leases (renewable for another 30 years) are granted to foreign investors in industrial estates, export processing zones, and real estate. In the oil and gas sector, the production-sharing arrangement pioneered by Indonesia and adopted by other countries in the region allow for foreign participation without resource ownership. In Thailand, promoted firms with majority foreign equity can apply for a waiver to own land, and foreign ownership of condominiums is allowed up to 40 percent of each condominium.

Foreign equity participation is generally prohibited or restricted in strategic sectors such as telecommunications, transportation, energy, mass media, and financial services, and in socially-sensitive sectors such as small-scale agriculture and retail trade. For other sectors, 100-percent foreign equity is currently permitted in all ASEAN countries, although in most cases, wholly-foreign ownership is conditional upon certain performance requirements, generally pertaining to the size of the investment, the level of exports, technology transfer, or location in geographically disadvantaged areas. Even then, joint ventures are still preferred, particularly in industries and activities that are perceived to impact on national security or that utilize local raw materials. Brunei and Singapore have the least restrictions on foreign equity participation. Brunei restricts foreign ownership only in activities relating to national food security and local resources. Singapore has few restrictions on 100-percent foreign ownership in manufacturing and this is reflected in the prevalence of 100-percent foreign-owned manufacturing enterprises; restrictions pertain only to newspaper publishing, TV and radio broadcasting, telecommunications, public utilities, and financial institutions serving the domestic market.

The Philippines prohibits foreign ownership in retail trade, mass media, and rural banking, and allows minority ownership in natural resource development, public utilities and energy, public works, and finance (other than rural banking). The negative list includes the mass media, professional services, small-scale mining, retail trade, cooperatives, and the rice and corn industries.

Thailand's Alien Business Law precludes foreign participation in specified sectors and industries, but liberal interpretations in recent years have led to many sectors, industries, and occupations being partially open to DFI. Minority foreign equity is allowed in agriculture, animal husbandry, mineral exploitation, and mining and services. In manufacturing, BOI-promoted projects are allowed 100-percent foreign equity where export ratios exceed 80 percent and majority foreign equity is allowed where export ratios are 50–79 percent. Foreign equity ratios are decided on a case-by-case basis for investments.
in infrastructure, public utilities, and technological development.

In Malaysia, few sectors and activities are closed or restricted to DFI, the major ones being the mass media and financial services. Ownership restrictions have been eased under the New Development Policy, with 100-percent foreign equity allowed for firms which export at least 80 percent of their output. The percentage of foreign equity allowed declines with the export ratio. Malaysia also imposes rules on the distribution of local equity in a foreign-local joint venture to safeguard the share of bumiputra (indigenous Malays).

Indonesia announced sweeping changes to foreign ownership restrictions in June 1994. Under the new rules, foreign investors are allowed 100-percent equity ownership without stipulation of any minimum capital requirement and do not have to divest to Indonesians for at least 30 years (previously, majority control had to be held by Indonesians within 15 years). Joint ventures require only a minimum of 5 percent local equity, down from the previous 20 percent. Only retail trade remains closed to foreigners. Foreigners can also buy into local companies listed on the Jakarta Stock Exchange, subject to a ceiling of 49 percent.

Investment Restrictions and Performance Requirements

Foreign investors generally view restrictions and performance requirements as disincentives which, at best, offset the incentives offered. ASEAN governments introduce performance requirements such as local content, local employment and training, export performance, and technology transfer to promote domestic entrepreneurship, improve the domestic linkage effects, and defend the country against MNE restrictive business practices pertaining to procurement, export sales restrictions, and transfer pricing. To be effective, however, such performance requirements have to be accompanied by parallel efforts to promote domestic enterprise, particularly parts and components suppliers, to improve the supply of skills and technological absorptive capacity, while restrictive business practices are best handled through multinational investment cooperation. Many of these performance requirements infringe on the TRIMs agreement of the Uruguay Round and need to be phased out.

Singapore stands out among ASEAN and other developing host countries in its absence of performance requirements. With a largely free-trade regime, enterprises are free to import raw materials and intermediate inputs, and the firms tend to be export-oriented. There are no requirements regarding technology transfer and no rules on employment of local personnel; liberal approval is given for foreign and local enterprises to employ foreign managerial, professional, and skilled workers. The government, however, is active in promoting competitive local supporting industries through technical and financial assistance and arranging tie-ups between MNEs and local suppliers, and providing incentives for manpower training and research and development activities.

Many performance requirements within ASEAN have recently been liberalized. Local content, export performance, and trade-balancing requirements have been largely dismantled within the ASEAN countries. Nevertheless, local content requirements are typically found in sectors such as automobiles and automotive components, processing industries, and minerals and oil-related activities. Repatriation of profits is nearly automatic in all ASEAN countries except Thailand. There are no minimum capital requirements in Malaysia, Singapore, the Philippines, and Thailand, and only minor requirements in Indonesia. More prominent in ASEAN are performance requirements which restrict employment of foreign personnel, frequently at the managerial and technical levels. The impact on DFI is potentially significant as these codes directly limit the flow of a firm-specific asset, that is, foreign human capital. All of the ASEAN nations other than Singapore attempt to promote local participation in foreign subsidiaries
through foreign worker restrictions. Indonesia’s regulations are most binding. Expatriate personnel are only permitted for a limited time in government-specified positions and in the absence of a qualified Indonesian. In the Philippines, foreign nationals in supervisory, technical, or advisory positions cannot be employed for more than five years. Malaysia and Thailand also enforce restrictions on the tenure of foreign-held executive positions. Singapore has no restrictions on foreign personnel at any level and foreign worker permits are easily obtained. Other indirect deterrents to foreign employment in ASEAN, with the exception of Malaysia, are restrictions or prohibitions on land ownership by foreigners. All ASEAN countries provide some protection to foreign investors against expropriation. Generally governments may not nationalize foreign investment except for public purposes and upon prompt and adequate compensation.

Some investment measures are effective in practice, although official laws do not exist on the books. DFI projects with local content, local employment and training, export, and technology transfer declarations are viewed more favorably in investment approvals. Such approval may be directly linked to particular performance requirements; performance requirements on local content and export are commonly linked to tax holidays and exemptions from import tariffs. When not mandatory, agreement to meet performance requirements could facilitate approval procedures.

Tariff Protection and Export Processing Zones

The ASEAN countries (including Singapore in the early 1960s) pursued import substitution through tariffs and quantitative restrictions to promote and protect manufacturing. While the strategy launched industrialization and attracted DFI to establish “tariff factories,” it also burdened the industrial structure with suboptimal plants serving limited domestic markets. For example, the ASEAN countries have automobile industries that are heavily dependent on import protection to remain viable in the small domestic markets. As the costs of import substitution became increasingly evident in the 1970s, governments progressively switched to export manufacturing and lowered their import tariffs and nontariff barriers.

To offset the negative effects of import restrictions on production costs and export competitiveness, the ASEAN governments have established export processing zones and provide full or partial tariff exemptions on imports of machinery and equipment, raw materials, and supplies, particularly when these are not available domestically. Singapore was the first to abandon import substitution and dismantle import restrictions; by the early 1970s the only import restrictions left were some tariffs retained for negotiations under the ASEAN Preferential Tariff Arrangement (PTA) as well as tariffs on alcoholic beverages, tobacco products, and petroleum products imposed to discourage social consumption and collect revenues. Most of the other ASEAN countries—i.e., Indonesia, Malaysia, the Philippines, and Thailand—were slower to adopt across-the-board trade liberalization and initially resorted to export processing zones to attract DFI. The EPZs usually have well-developed infrastructure and industrial facilities, have simplified investment approval and administrative procedures, allow full or partial exemption of trade tariffs, have reduced foreign ownership restrictions (often with 100-percent foreign ownership allowed), and provide generous fiscal incentives. Not all EPZs have been successful in attracting DFI and securing welfare benefits for the host country. Some of the problems arise from the remote location of the EPZs, inadequate and inefficient infrastructure, and poor management. Since the mid-1980s, the four large ASEAN members have been more inclined towards across-the-board trade liberalization measures.

Foreign Exchange Controls and Investment Guarantees

Brunei and Singapore have traditionally the strongest currencies and balance-of-payments positions in ASEAN and impose no restrictions on
foreign exchange transactions and repatriation of capital and remittances of income. With improved balance-of-payments positions, the other ASEAN countries have liberalized their foreign exchange regimes and currently impose no restrictions on foreign exchange transactions, except for the Philippines.

In the immediate post-independence period, some ASEAN countries embarked on nationalization of foreign assets as part of their national sovereignty and distribution programs. Since then, foreign-owned assets in all ASEAN countries are protected against nationalization, except for public purposes and with fair compensation, and this guarantee is embodied either in the constitution, foreign investment laws, or bilateral investment treaties. Malaysia and the Philippines have constitutional provisions against nationalization. In Indonesia and Thailand, the guarantee is provided in the Foreign Capital Investment Law of 1967 and the Promotion of Investment Act of 1977, respectively.

In addition, the ASEAN countries have entered into a number of bilateral investment agreements. Such agreements usually provide for right of establishment of foreign firms and their being accorded national treatment (with exclusions and exceptions), rights to repatriate capital and income without restriction, and assurances that foreign-owned assets will only be expropriated under well-defined conditions and with fair and prompt compensation. Many bilateral agreements also provide for the avoidance of double taxation. In addition, all of the ASEAN members are covered by the Multilateral Investment Guarantee Agency (MIGA) which insures DFI in developing countries against noncommercial risks.

EVIDENCE ON THE SUCCESS OF DFI POLICIES IN ASEAN

In comparison to other developing economies, the ASEAN countries have been exceptional in their progressive and unilateral efforts to attract foreign investors through the liberalization of investment measures. As a result, Southeast Asia has attracted a disproportionate share of investment inflows in the developing world. Singapore and Malaysia have ranked within the top ten developing economies for average annual DFI inflows since the 1970s, with Thailand entering the list in the 1980s (see Table 3.2).

As was noted earlier, investment measures may distort DFI levels and patterns as well as international trade, but empirical evidence testing the hypothesis that existing measures in the region have resulted in significant distortions is hardly conclusive for several reasons. First, descriptive data on investment measures are limited and of varying quality. Investment measures on the statutes in many countries may be misleading as measures are often discretionary and negotiable. No international agency collects or publishes standardized data on investment measures across countries or time. Existing studies rely mainly on survey data from MNEs about their subsidiaries operating under investment measures, and these firms may have incentives to misstate the extent to which measures alter their decisions. A selection problem is also present as firms who might invest in the absence of a performance requirement are excluded from the sample.

Second, the existence of a performance requirement or incentive in a particular case does not imply that the measure was binding or influential on MNE behavior. One conclusion of the United Nations’ analysis is that the majority of investment measures may be redundant. Third, constructing an adequate index of distortion for a specific measure is difficult. Investment measures may influence investment and trade within a firm on many levels such as investment location, plant size, technology, and input use. In a general context, the combination of various measures may have interrelated and offsetting effects. For example, fiscal incentives and subsidies
Table 3.2  Top Ten Developing Countries in Terms of Annual Flows of DFI ($ billion)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Brazil</td>
<td>11.3</td>
<td>Singapore</td>
<td>2.3</td>
</tr>
<tr>
<td>Mexico</td>
<td>0.6</td>
<td>Mexico</td>
<td>1.9</td>
</tr>
<tr>
<td>Egypt</td>
<td>0.3</td>
<td>Brazil</td>
<td>1.8</td>
</tr>
<tr>
<td>Malaysia</td>
<td>0.3</td>
<td>China, People’s Rep. of</td>
<td>1.7</td>
</tr>
<tr>
<td>Nigeria</td>
<td>0.3</td>
<td>Malaysia</td>
<td>1.1</td>
</tr>
<tr>
<td>Singapore</td>
<td>0.3</td>
<td>Hong Kong</td>
<td>1.1</td>
</tr>
<tr>
<td>Indonesia</td>
<td>0.2</td>
<td>Egypt</td>
<td>0.9</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>0.1</td>
<td>Argentina</td>
<td>0.7</td>
</tr>
<tr>
<td>Iran</td>
<td>0.1</td>
<td>Thailand</td>
<td>0.7</td>
</tr>
<tr>
<td>Uruguay</td>
<td>0.1</td>
<td>Taipei, China</td>
<td>0.5</td>
</tr>
</tbody>
</table>

Share of flows (%) 66 Share of Flows (%) 68


are often used to offset the burden of a performance requirement.

Because no comprehensive database exists, we obtain a partial view of the impact of investment measures in the region by considering the U.S. Department of Commerce’s 1982 benchmark survey of U.S. direct investment abroad. The data rely on U.S. MNEs reporting how many of their overseas affiliates were subject to various investment incentives and requirements. In addition to the problems mentioned above, this approach provides no evidence about the magnitude of investment incentive or restriction. We merely observe the percentage of reporting U.S. affiliates abroad that are subject to a particular measure (Table 3.3).

The data in Table 3.3 provide some indication of the frequency with which certain investment measures are imposed. No more than 8 percent of the U.S. foreign affiliates surveyed were subject to any one given performance requirement. This supports observations by other studies that investment measures are infrequent and relatively unimportant. Less than 2 percent of U.S. affiliates were subject to the investment measures that are covered under the Uruguay Round agreement. This low incidence of reported subsidiaries subject to investment measures initially appears contrary to observations of a large number of countries with measures on the statutes. This may indicate that investment measures are often discretionary and negotiable.

Restrictions appear to be more common in developing economies than in developed-market economies (most notably in employment, technology transfer, and equity requirements). Up to 15.4 percent of affiliates in developing countries were subject to at least one investment measure. Note that these results are somewhat inconclusive as important developed-market investment measures, such as “rules of origin,” are excluded from the survey. Incidence of investment measures in ASEAN appears similar to that in developing countries overall. Foreign affiliates report slightly fewer restrictions on trade flows. Although not apparent
Table 3.3 U.S. Foreign Affiliates Subject to Performance Requirements and Investment Incentives (percentage)

<table>
<thead>
<tr>
<th>Measure</th>
<th>Total</th>
<th>Developed Market Economies</th>
<th>Developing Economies</th>
<th>ASEAN*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Performance requirements</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Export requirements</td>
<td>1.6</td>
<td>1.1</td>
<td>2.7</td>
<td>3.0</td>
</tr>
<tr>
<td>Import limits</td>
<td>1.5</td>
<td>0.5</td>
<td>3.4</td>
<td>1.2</td>
</tr>
<tr>
<td>Local content requirements</td>
<td>1.1</td>
<td>0.6</td>
<td>2.1</td>
<td>2.1</td>
</tr>
<tr>
<td>Employment requirements</td>
<td>7.8</td>
<td>4.0</td>
<td>15.4</td>
<td>11.4</td>
</tr>
<tr>
<td>Technology transfer conditions</td>
<td>3.6</td>
<td>1.8</td>
<td>7.4</td>
<td>13.1</td>
</tr>
<tr>
<td>Trade balance restrictions</td>
<td>1.4</td>
<td>0.6</td>
<td>3.0</td>
<td>1.3</td>
</tr>
<tr>
<td>Equity limits</td>
<td>4.4</td>
<td>1.4</td>
<td>10.3</td>
<td>10.9</td>
</tr>
<tr>
<td>Investment incentives</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tax concessions</td>
<td>24.8</td>
<td>24.5</td>
<td>26.3</td>
<td>27.0</td>
</tr>
<tr>
<td>Tariff concessions</td>
<td>9.8</td>
<td>6.7</td>
<td>16.4</td>
<td>19.8</td>
</tr>
<tr>
<td>Subsidies</td>
<td>14.2</td>
<td>17.5</td>
<td>8.7</td>
<td>14.3</td>
</tr>
<tr>
<td>Other</td>
<td>7.4</td>
<td>6.8</td>
<td>8.8</td>
<td>17.8</td>
</tr>
</tbody>
</table>

Note:
a. Excluding Brunei.


From formal investment codes, ASEAN requirements for technology transfer are remarkably higher than the developing-economy average (13.1 percent versus 7.4 percent). The most frequently used performance requirements within ASEAN in 1982 appear to be technology transfer requirements, employment requirements (11.4 percent), and equity limits (10.9 percent).

With respect to investment incentives, developed countries were clearly more likely to offer subsidies and less likely to provide tariff concessions. This is due, in part, to the higher tariff levels imposed in developing economies. Affiliates in ASEAN countries report an incidence of subsidies and other investment incentives (14.3 percent and 17.8 percent, respectively) that is higher than the world averages (14.2 percent and 7.4 percent, respectively) and comparable or exceeding that of developed-market economies (17.5 percent and 6.8 percent, respectively).

INVESTMENT POLICIES IN THE UNITED STATES

As inward DFI increased in the United States, nearly quintupling in the 1980s, growth in outward U.S. DFI has slowed. Yet, the United States continues to provide an open and liberal investment regime within a stable nondiscriminatory environment. Based on the principle of national treatment, U.S. policy toward DFI has not changed for decades.25
PERFORMANCE REQUIREMENTS AND RESTRICTIONS

The many laws that exist at the federal, state, and local levels with jurisdiction over investment are generally applied without regard to nationality. Indeed, neither the U.S. federal nor state governments have a definitive DFI law. As there are no DFI performance requirements, the United States does not have a monitoring and enforcement agency. Two distinct classes of laws, however, do treat domestic and foreign investment differently: laws that protect national security and laws that protect classified information.

In a few key industries, foreign investment is limited for national security reasons. These include aviation, banking, government securities dealers, mining on federal lands, nuclear energy, ocean thermal energy, shipping, and broadcasting and telecommunications. Although very rarely used, the President of the United States is also authorized, under the Exon-Florio Amendment to the Defense Production Act, to block mergers and acquisitions of U.S. firms by foreign investors if the investment poses a credible threat to national security.

The Industrial Security Program of the Executive Orders and Defense Department regulates access to security clearances necessary to contract with classified information. Foreign-owned or -controlled facilities are generally ineligible for these clearances. The International Traffic in Arms Regulations of the Department of State also requires applicants to obtain licenses, which may be subjectively denied, for transfer of technical data to foreigners.

INVESTMENT PROMOTION AND INCENTIVES

The U.S. federal government does not have incentive programs specifically directed at inward DFI, as foreign investors receive national treatment instead of fiscal and financial incentives. Investment incentives are primarily conducted by state and local governments.

State investment programs are typically administered by cabinet-level state economic development agencies to promote state economic growth and employment. Many states offer incentive packages to foreign investors, including financial and tax incentives, and development capital credit. Non-financial assistance may entail business consulting, job training, research and development assistance, language training, and relocation assistance. In general, financial incentives are also available in a nondiscriminatory fashion.

REGIONAL AND MULTILATERAL INVESTMENT COOPERATION

ASEAN INVESTMENT COOPERATION

Although ASEAN industrial cooperation began in the mid-1980s, it has generated mixed results. We outline below past and recent efforts to stimulate industrial cooperation in the region (Table 3.4).

Industrial Cooperation Schemes

ASEAN has implemented three industrial cooperation schemes, so far with limited success. First, the ASEAN Industrial Projects (AIP) was initiated in 1976 as a key feature of ASEAN economic cooperation. Regional investment projects were identified by government officials, distributed among the participating member-states, and with the host country having a 60-percent equity share while the other countries each held a 10 percent share. After prolonged negotiations and hitches, only two projects were eventually implemented, namely, the urea projects in Indonesia and Malaysia (both of which began as national projects). Failure of the scheme was due largely to national conflicts over regional specialization and location of projects, and reluctance of the governments to support these regional projects at the expense of national industrial priorities.

The ASEAN Industrial Complementation (AIC) scheme was introduced in 1981. The objective of this
### Table 3.4: ASEAN Participation in Bilateral and Multilateral Investment Agreements

<table>
<thead>
<tr>
<th></th>
<th>Brunei</th>
<th>Indonesia</th>
<th>Malaysia</th>
<th>Philippines</th>
<th>Singapore</th>
<th>Thailand</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Bilateral investment &amp; taxation treaties</strong></td>
<td>Double taxation agreement with U.K.; unilateral relief on income arising from Commonwealth countries that provide reciprocal relief</td>
<td>Bilateral trade &amp; investment agreements with several countries including Australia, Canada, Korea, Singapore, Taiwan, U.S.; double taxation agreements with over a dozen countries including Canada, India, Japan, Korea, New Zealand, Pakistan, Philippines, Singapore, Thailand, and the U.S.</td>
<td>na</td>
<td>Bilateral agreements with Japan, China, and Taiwan</td>
<td>Bilateral investment guarantee agreements with other ASEAN countries, China, Korea, Laos, Vietnam, South Asian countries, European countries, Canada, U.S., Peru, and Japan</td>
<td></td>
</tr>
<tr>
<td><strong>ASEAN agreements</strong></td>
<td>Intra-ASEAN investment agreement; Preferential Trading Arrangement (PTA); ASEAN Free Trade Area; growth triangle agreement with Indonesia, Malaysia, and the Philippines</td>
<td>Intra-ASEAN investment agreement; Preferential Trading Arrangement (PTA); ASEAN Free Trade Area; industrial cooperation agreements; growth triangle agreements with Singapore, Malaysia, and Thailand</td>
<td>Intra-ASEAN investment agreement; Preferential Trading Arrangement (PTA); ASEAN Free Trade Area; industrial cooperation agreements; growth triangle agreements with Brunei, Indonesia, the Philippines, Singapore, and Thailand</td>
<td>Intra-ASEAN investment agreement; Preferential Trading Arrangement (PTA); ASEAN Free Trade Area; industrial cooperation agreements; growth triangle agreement with Indonesia and Malaysia</td>
<td>Intra-ASEAN investment agreement; Preferential Trading Arrangement (PTA); ASEAN Free Trade Area; industrial cooperation agreements; growth triangle agreement with Indonesia and Malaysia</td>
<td></td>
</tr>
<tr>
<td><strong>Regional/international agreements</strong></td>
<td>Multilateral Investment Guarantee Agency (MIGA)</td>
<td>MIGA; International Center for the Settlement of Investment Disputes (ICSID); GATT</td>
<td>MIGA; GATT</td>
<td>MIGA; GATT</td>
<td>MIGA; GATT; Mekong project</td>
<td></td>
</tr>
</tbody>
</table>

Source: Compiled from APEC (1993).
second scheme was to encourage vertical integration of industrial processes among the ASEAN countries to exploit regional scale economies. However, only two AIC packages involving automotive parts and components have been launched. The first package, launched in 1983, faced national conflicts over location of the higher value added processes, and Malaysia’s decision to develop its own national car reduced the scope for regional specialization. Interest in the AIC was revived with brand-to-brand complementation in 1988, and the private sector was allowed to determine the location of various production processes. However, existing differences in brands and types of vehicles among ASEAN automobile producers made cooperation difficult, while Indonesia’s decision not to participate reduced the scope for regional scale economies.

The third scheme, the ASEAN Industrial Joint Venture (AIJV), was introduced in 1983 in response to the slow progress of the AIC scheme. Participation was made more flexible: not all ASEAN countries would have to participate in a project, there could be foreign equity of up to 49 percent, and there would be a tariff preference margin of 75 percent under the ASEAN Preferential Trading Arrangement (PTA). The scheme was later modified to allow for a faster approval process, higher foreign equity participation (60 percent), and a higher tariff preference margin. By yearend 1990, 18 products had been granted AIJV status and, in 1991, another eight were approved. The majority of AIJVs have foreign participation, and plant locations are concentrated in Malaysia and Thailand.

ASEAN Growth Triangles

The slow progress in ASEAN industrial cooperation and in ASEAN-wide trade liberalization under the ASEAN PTA led to the emergence of investment cooperation at the subgroup level; the concept of the growth triangle was mooted as a transnational investment zone comprising geographically contiguous areas in the ASEAN region.

The first ASEAN growth triangle known as SIJORI (acronym for Singapore-Johor-Riau) was launched in the late 1980s. It encompasses Singapore, the southern Malaysian state of Johor, and the western Indonesian province of Riau, and covers a contiguous area of 20,000 sq. km., a population of five million, and per capita incomes ranging from over US$14,000 in Singapore to over US$3,000 in Johor and less than US$1,000 in Batam. Singapore-Riau and Singapore-Johor links have developed rapidly. Riau and Johor have experienced accelerated inflows of DFI as well as increased domestic investments for infrastructural, resource, industrial, and commercial development. Investments from Singapore (including foreign MNEs based in Singapore) helped transform the Riau islands of Batam and Bintan, with investments in infrastructure, including industrial parks and tourism projects, and factories. In Batam, the population swelled from a mere 7,000 in the early 1970s to 146,000 in 1993, with immigration from other parts of Indonesia and a growing expatriate population. Total foreign investments reached US$1.6 billion by yearend 1993, of which over half was from Singapore. The gross domestic output of Batam has grown at an average annual rate of 14 percent in recent years, about double the Indonesian national average. Batam’s exports (mainly through Singapore) reached US$926 million in 1993, and tourist arrivals (mainly from and through Singapore) reached 680,400. Bintan island is undergoing similar rapid development. Developments in Johor have been less dramatic, as it was already one of the most advanced and industrialized states in Malaysia, and Singapore’s economic links with Johor have been longstanding and pre-dated SIJORI. Nonetheless, under the SIJORI framework, Singapore investments in Johor have accelerated in recent years.

SIJORI can be considered a success story in subregional investment cooperation, and this may be attributed to three factors. First, political and policy support was decisive in establishing SIJORI. For the
Singapore-Riau sector, the relaxation of Indonesian regulations on foreign investment in Batam and the strong support by the Singapore government to help build the industrial park and encourage Singaporean enterprises and foreign MNEs to relocate or expand into Batam were crucial. Singapore and Indonesia signed three bilateral agreements providing the framework for the joint development of Riau province. For the Singapore-Johor sector, traditionally close political and economic relations were further enhanced under the SIJORI framework.

Second, strong economic complementarity underpins political cooperation. SIJORI as an integrated investment zone is more attractive than its separate parts. It combines the competitive advantages of Singapore, Johor, and Riau—integrating the availability of capital, technology, and human resources with the availability of land, natural resources, and labor for the exploitation of differences in comparative advantage and economies of scale and agglomeration. There is strong economic complementarity between Singapore, on the one hand, and Johor and Riau, on the other.

Third, well-developed transportation and telecommunications networks and geographical proximity facilitate subregional integration. Proximity to Singapore enables investors in Batam and Johor to access Singapore’s expertise and infrastructure, and to manage their Johor and Batam operations from the Singapore base. The distance of Johor and Batam from Singapore is much less than the distance from their national capitals; Batam is a 30-40 minute ferry ride, while Johor is a 30-minute drive from Singapore.

SIJORI is a very small transnational investment zone when compared to the larger and more market-driven economic zone encompassing Hong Kong, Taiwan, and the south China provinces of Guangdong and Fujian. Investor interest in Batam is slowing down and there is need to resolve Batam’s shortage of labor and lack of free access to the Indonesian domestic market. Batam has to compete not only with South China but also with Java as an investment location; with the recent policy liberalizations, the policy attractions of investing in Batam have disappeared and investors are more attracted to Java’s large labor supply and large domestic market.

In the meantime, two other ASEAN growth triangles are being planned, with the enthusiastic support of the respective national and local governments. The Northern or IMT (Indonesia, Malaysia, Thailand) growth triangle encompasses provinces/states in western Indonesia, northern Malaysia, and southern Thailand. It is larger than SIJORI, covering an area of 180 thousand sq. km. with an estimated population of 22 million and a GDP of US$13.4 billion. However, economic complementarity is less apparent than in SIJORI. And while there is geographical contiguity, the border areas are widely dispersed and transportation/infrastructural links are weak. Northern Malaysia is the most industrialized, while Northern Sumatra and southern Thailand have extensive land and natural resources and abundant labor supplies. There are good prospects for joint development of infrastructure, natural resources, (including agro-processing) and tourism, but opportunities for large-scale industrial cooperation are less obvious. Penang is the main industrial center but it is unlikely to provide sufficient spillover effects as it is much smaller than Singapore and its natural hinterland lies within Malaysia. The IMT needs considerable external resources to finance infrastructural development.

The Eastern or BIMP (Brunei, Indonesia, Malaysia, Philippines) growth area encompasses Brunei, eastern Indonesia, southern Philippines, and eastern Malaysia. BIMP is larger than IMT but geographically more dispersed. It is rich in land and marine resources, including oil. Brunei is the richest partner and could be the major source of financial capital. Likely areas of cooperation include joint development of marine resources, energy, transportation,
and tourism. Like IMT, the prospects of industrial cooperation are more limited than SIJORI.

**ASEAN Free Trade Area**

The ASEAN Free Trade Area (AFTA) was launched in January 1994 with tariff reductions under the Common Effective Preferential Tariff (CEPT) as the main instrument and the objective of a regional free trade within a time frame of ten years (down from the initial agreement of 15 years). AFTA was formed not as a protectionist trading bloc but to help the ASEAN economies achieve greater competitiveness in trade and to attract foreign investment. It was felt that with an integrated market, ASEAN would be more attractive to foreign and regional investors, and production in the region could be rationalized to reflect comparative advantage and achieve scale economies, resulting in greater competitiveness in the regional and international markets. No direct measure affecting the rules governing investment were taken in AFTA.

Reduction in trade barriers alone may not be enough to maintain ASEAN's attractions for regional and foreign investors in view of the growing international and regional competition for private investments in the 1990s. ASEAN's combined market size is less than 6 percent that of NAFTA, and within Asia, foreign investors are increasingly attracted to China, Vietnam, and India. In particular, China has become the largest absorber of DFI in Asia. Thus, the ASEAN governments need to further liberalize their investment regimes and explore more joint efforts at investment promotion. In addition, ASEAN enterprises need to enter into strategic business alliances with non-ASEAN enterprises to secure technology and expertise, and produce and sell in the Asia-Pacific and world markets. ASEAN economies and businesses need to be increasingly integrated into the global economy.

**U.S. BILATERAL AND MULTILATERAL AGREEMENTS**

The United States is party to many bilateral and multilateral investment treaties and agreements. However, none of these agreements are comprehensive and, hence, the United States continues to be interested in greater cooperation in this area.

**Bilateral Agreements**

There are three basic types of U.S. bilateral investment agreements. The first type is the Friendship, Commerce, and Navigation (FCN) Treaty of which 47 are currently in force. Dealing with a wide range of bilateral commercial and investment issues, this program was concluded in 1966 (with Thailand) in favor of multilateral negotiations. Second, Bilateral Investment Treaties (BITs) were developed by the United States in the early 1980s because of slow progress in the multilateral fora. BITs obligate parties to allow national treatment and most-favored-nation treatment in establishment and operation of investment, the right to freely transfer funds internationally, and a commitment to obey international law standards for expropriation. The United States has signed BITs with 24 countries, 13 of which are in force but none from ASEAN. A third form of agreement is the U.S. Overseas Private Investment Corporation (OPIC) which provides a procedural framework for the U.S. government investment insurance program.

**The North American Free Trade Agreement (NAFTA)**

In January 1994, the United States entered into a free trade agreement with Mexico and Canada under which nearly all regional tariffs will be eliminated over 10-15 years. NAFTA also includes ambitious chapters on investment measures and intellectual property. NAFTA signatories will adhere to principles of national treatment, most-favored-nation treatment, and procedural transparency. The
NAFTA investment chapter provides NAFTA investors with the right to establishment and acquisition, repatriation of profits for all payments associated with an investment, international law protection from expropriation, and the right to seek monetary damages for violations of NAFTA. NAFTA also ensures member investors the right to establish and operate free from performance requirements including export, domestic content, technology transfer, and foreign exchange transfer requirements.

**U.S. Multilateral Agreements**

The United States subscribes to the agreements of the Organization for Economic Cooperation and Development (OECD) which regulate investment between member-states. The Code of Liberalization of Capital Movements and the Code of Liberalization of Current Invisible Operations legally bind members to national treatment on new investments, while the National Treatment Instrument requires members to extend national treatment to existing operations.

**Recent Multilateral Investment Cooperation**

Two recent rounds of negotiations will have legitimacy over the investment regimes of ASEAN in the near future: the TRIMs agreement in the Uruguay Round and the APEC Investment Code. In addition, the nonbinding Asia-Pacific Investment Code is likely to form the basis of future cooperative agreements.

**Uruguay Round Agreement of the GATT.** The United States is a key pursuivant of the agreement on trade-related investment measures (TRIMs) in the Uruguay Round of the GATT. The agreement, though limited, brings investment measures directly under the purview of the GATT. Once enacted on July 1, 1995, the Uruguay Round accord will restrict the use of three TRIMs: local content requirements, trade-balancing requirements, and foreign exchange balancing requirements. A two-year grace period is given to developing countries, and seven years is given to least-developed economies with more time granted upon consent of all contracting parties. A separate accord on subsidies prohibits various investment incentives, including export performance and local content subsidies.

The ASEAN nations are largely in compliance with the forthcoming GATT standards on TRIMs. Yet all of the ASEAN countries, with the exception of Singapore, maintain local content requirements in some industries, most notably in the motor vehicle sector. In Indonesia, for example, there are numerous discretionary local content schemes, especially in the machinery, metal, engineering, and transportation equipment industries. Thailand maintains local content requirements for tea leaf and dust, silk and silk yarn, pasteurized and skim milk, motor vehicles, and various manufacturing industries. Participation in the Philippine Car Development Program requires at least 40 percent local content. Liberalization in these industries will be required under the Uruguay Round. Of greater consequence to investment regimes of ASEAN, however, is the prohibition of many investment incentives which are currently provided in a discretionary fashion.

**APEC Investment Code.** The APEC Eminent Persons Group (EPG) recommended in its first report that APEC should adopt an Asian Pacific Investment Code (APIC) "to reduce the uncertainties and transaction costs of trade and investment in the region" but stopped short of defining the elements of such a code. The second EPG report recommended the early adoption of a voluntary APEC Concord on Investment Principles, voluntary "in the sense that each member can decide for itself whether or when to apply the agreed principles." The investment principles are the following: transparency of investment policies, including any exceptions to the general commitments; national treatment for foreign investors; nationalization only for public purposes; standstill on new performance requirements and investment incentives, and a rollback of existing practices building on and going
Box 3.2: APEC Nonbinding Investment Principles

In the spirit of APEC’s underlying approach of open regionalism,

Recognizing the importance of investment to economic development, the stimulation of growth, the creation of jobs and the flow of technology in the Asia-Pacific region,

Emphasizing the importance of promoting domestic environments that are conducive to attracting foreign investment, such as stable growth with low inflation, adequate infrastructure, adequately developed human resources, and protection of intellectual property rights,

Reflecting that most APEC economies are both sources and recipients of foreign investment,

Aiming to increase investment, including investment in small and medium enterprises, and to develop supporting industries,

Acknowledging the diversity in the level and pace of development of member economies as may be reflected in their investment regimes, and committed to ongoing efforts towards the improvement and further liberalization of their investment regimes,

Without prejudice to applicable bilateral and multilateral treaties and other international instruments,

Recognizing the importance of fully implementing the Uruguay Round TRIMs Agreement,

APEC members aspire to the following nonbinding principles:

Transparency
- Member economies will make all laws, regulations, administrative guidelines and policies pertaining to investment in their economies publicly available in a prompt, transparent and readily accessible manner.

Nondiscrimination Between Source Economies
- Member economies will extend to investors from any economy treatment in relation to the establishment, expansion and operation of their investments that is no less favorable than that accorded to investors from any other economy in like situations, without prejudice to relevant international obligations and principles.

National Treatment
- With exceptions as provided for in domestic laws, regulations and policies, member economies will accord to foreign investors in relation to the establishment, expansion, operation and protection of their investments, treatment no less favorable than that accorded in like situations to domestic investors.

Investment Incentives
- Member economies will not relax health, safety, and environmental regulations as an incentive to encourage foreign investment.
Box 3.2: APEC Nonbinding Investment Principles (continued)

Performance Requirements
• Member economies will minimize the use of performance requirements that distort or limit expansion of trade and investment.

Expropriation and Compensation
• Member economies will not expropriate foreign investments or take measures that have a similar effect, except for a public purpose and on a nondiscriminatory basis, in accordance with the laws of each economy and principles of international law, and against the prompt payment of adequate and effective compensation.

Repatriation and Convertibility
• Member economies will further liberalize towards the goal of the free and prompt transfer of funds related to foreign investment, such as profits, dividends, royalties, loan payments and liquidations, in freely convertible currency.

Settlement of Disputes
• Member economies accept that disputes arising in connection with a foreign investment will be settled promptly through consultations and negotiations between the parties to the dispute or, failing this, through procedures for arbitration in accordance with members' international commitments or through other arbitration procedures acceptable to both parties.

Entry and Sojourn of Personnel
• Member economies will permit the temporary entry and sojourn of key foreign technical and managerial personnel for the purpose of engaging in activities connected with foreign investment, subject to relevant laws and regulations.

Avoidance of Double Taxation
• Member economies will endeavor to avoid double taxation related to foreign investment.

Investor Behavior
• Acceptance of foreign investment is facilitated when foreign investors abide by the host economy's laws, regulations, administrative guidelines and policies, just as domestic investors should.

Removal of Barriers to Capital Exports
• Member economies accept that regulatory and institutional barriers to the outflow of investment will be minimized.
beyond the agreement on performance requirements reached in the Uruguay Round; and establishment of a dispute settlement mechanism to help resolve problems of interpretation and enforcement of the code. Such a mechanism could pave the way for broader APEC dispute settlement procedures and complement the dispute settlement process of the new World Trade Organization.

The EPG Report encouraged the adoption of the nonbinding Concord at the outset, as abstaining members could be placed at a competitive disadvantage in attracting foreign investments. The proposed investment principles were endorsed by the APEC Ministerial Meeting in Bogor (Indonesia) in November 1994, and the subsequent Bogor Declaration of APEC leaders stated that "Ministers and officials will submit proposals on APEC arrangements on...investment principles."

The APEC Nonbinding Investment Principles, which was agreed upon in the APEC Ministerial Meeting in November 1994, reflects the growing interest in recent years for a multilateral investment code to facilitate international investment flows. The code calls for transparency of investment laws and regulations, nondiscrimination between source economies, national treatment except those provided for in domestic laws, and minimization of performance requirements, among other things (see Box 3.2: APEC Nonbinding Investment Principles). This code should thus reduce informational and transaction costs facing investors, improve the welfare effects of foreign investments, avoid zero-sum competition among host countries, and balance the interests of home and host governments and investing firms. Absent from the agreement is any reference to investing firms having to behave as good corporate citizens in the host countries.

PECC’s Asian-Pacific Investment Code. The Pacific Economic Cooperation Council (PECC) has proposed an investment code for its member countries that is modeled on the OECD’s code (which PECC is currently reviewing). In 1993 a PECC task force proposed an Asia-Pacific Investment Code (APIC) for possible adoption by member countries. The goal of this nonbinding set of recommendations is to foster regional harmonization and liberalization of investment rules. Although voluntary in nature, it has been asserted that the APIC draft provides a building block for the evolution of more formal, regional cooperation.

APIC has the following provisions and principles: agreement to be transparent on tax legislation, regulations, incentives, subsidies, and performance requirements; adherence to the principles of right of establishment, national treatment, and most-favored-nation treatment; endorsement of increasing harmonization of foreign investment policies; agreements for avoidance of double taxation; guarantees against nationalization except for public purposes, and on a nondiscriminatory basis and with fair compensation; freedom to transfer funds in a convertible currency at the prevailing market exchange rate for settlement of investment disputes; subscription to international legal conventions; and obligations on investors to behave as good corporate citizens.

Acceptance of a multilateral code has increased as investment relations have improved between host governments, home governments, and MNEs. First, host governments have become more open to DFI, as their economies have become more market-oriented, as alternative sources of financing economic development have become more problematic, and as they become less xenophobic and more confident in handling issues impinging on national sovereignty. Second, home governments have also become less intrusive and more ready to resort to international and bilateral mechanisms to settle investment disputes. And as more countries become both home and host to private investments, the perception of national interest becomes more complex and less one-sided. Third, MNEs have gained experience in foreign investment under different political, social,
and policy regimes and have become better corporate citizens, conforming to codes of conduct and behavioral guidelines drawn up by the OECD, national governments, and business and industry groups. Finally, the proliferation of bilateral agreements can lead to an administrative overload, particularly when such agreements lack common standards and provisions. According to a PECC study, it would require 105 bilateral agreements to link the 15 APEC member countries (excluding Mexico and Papua New Guinea).

OPPORTUNITIES FOR ASEAN–U.S. NEGOTIATION

As a critical component of ASEAN economic relations, DFI must be considered in the efforts to promote regional cooperation, a fact that is clearly understood by ASEAN leaders. In this area, great progress has been achieved through unilateral action over the past decade. We are therefore optimistic that at least a limited regional agreement on investment can be reached. Such an agreement would provide an essential building block for assimilation and freer trade and investment within the region. By promoting greater efficiency in the attraction and distribution of capital and technology through DFI, cooperation on investment codes will likely be beneficial for the region.

We encourage ASEAN and the United States to cooperate in GATT and the WTO to ensure a free and open global trading environment. Notwithstanding the formation of AFTA and NAFTA, and proposals for continental "blocs" in the form of the East Asian Economic Caucus (EAEC) and the Free Trade Area of the Americas (FTAA), economic linkages between ASEAN and the United States can be strengthened to fulfill the APEC Bogor Declaration of open trade and investment in the Asia Pacific by the year 2020. Although largely in the discussion stage, recent attempts to discipline DFI through cooperative efforts have emerged with potentially substantial investment liberalization benefits. A reasonable pact on investment might include the following agenda.

Conditions standard in many investment treaties, such as NAFTA and APIC, are already largely in practice within ASEAN. Investors would have the right to repatriate profits or proceeds derived from investment at market rates of currency exchange and without penalty. A code would limit governments from nationalizing or expropriating an investment, either directly or indirectly, except for public purposes and on a nondiscriminatory basis, and upon compensation at fair market values and without delay.

An effort should be made to identify investment measures which are detrimental to welfare in the region and subject to discipline. A minimum list would include local content, trade-balancing, and export performance requirements as they have been banned under the Uruguay Round accord. The agreement would establish conditions for reduction or elimination of these measures on a negotiated timetable.

It may be difficult to establish a consensus for the elimination of certain performance requirements, such as local equity restrictions, that are designed to protect broader goals of economic development and national sovereignty. Signatories should commit, however, to the employment of these measures on a most-favored-nation basis with national treatment granted to firms from signatory countries. In the interest of transparency, full information about performance requirements should be provided upon request from another contracting party and the right of establishment assured.

In addition to an ASEAN–U.S. investment arrangement, closer integration of intra-ASEAN policies would be advantageous to all. Perhaps the most beneficial outcome of a ASEAN investment agreement would be a reduction in incentive provisions in the region. To limit wasteful competition
within ASEAN, an accord on the further harmonization of fiscal investment inducements would be desired. ASEAN has already achieved a level of uniformity in incentive packages through unilateral reforms. A regional agreement could extend this progress by instituting ceilings on investment incentives and providing a forum for future incentive reduction negotiations.

Nations should cooperate to improve data on DFI flows and patterns and provide information on DFI policies, rules, and regulations so as to improve official policymaking, economic analysis, and business decisionmaking. DFI statistics of countries are currently incomparable, highly inadequate, and a far cry from the standards achieved in trade statistics. There is also a need for greater transparency and standardized inventory of DFI policies, rules and regulations, incentives, and performance requirements. The *Guide to the Investment Regimes of the Fifteen APEC Member Countries* compiled by the APEC Informal Group on Regional Trade Liberalization and published by the APEC Secretariat in November 1993 is only a first step. Improvements are needed to fill the gaps and to standardize the inventory of policies and measures.

Periodic meetings to review the investment policy regimes of contracting parties would promote transparency and deter the introduction of new investment measures. In the future, a formal process for the resolution of disputes of noncompliance should be established. Finally, broader agreements to liberalize trade in the region would be useful. By expanding the availability of regional input and output markets, welfare-enhancing DFI would tend to be promoted.

In sum, the potential for a comprehensive U.S.—ASEAN agreement on investment measures appears promising. A great degree of policy convergence has already been achieved through unilateral government reforms. Even a limited agreement which formalized the ASEAN commitment to secure DFI could pave the way for more thorough investment liberalization efforts in the future. Although an investment treaty may imply short-term adjustments, the result will be substantial benefits to the region in the long run.
NOTES


3. The most complete evidence of the ineffectual nature of incentives is found in Guisinger and Associates (1985).


8. For example, see Nicolaides' (1991) argument against limits on foreign firm entry and for national treatment of all firms either foreign or domestic.


11. Some restrictions and time limits apply to duty exemptions on raw materials in Indonesia.

12. For export ratios of 51-79 percent, foreign ownership of 100 percent is allowed where investments in fixed assets reached RM50 million or the value added ratio is at least 50 percent; for export ratios of 50 percent and less, the foreign equity ratios were correspondingly lower with exceptions being made depending on the size of the investment, value added, location, level of technology, and spinoff effects.

13. Prior to the June 1994 changes, the negative list of prohibited and restricted sectors included transportation (taxi/bus, local shipping, scheduled/chartered flights, aircraft, and components workshop located in the airport), retail trade, advertising, TV and radio broadcasting services, and cinema operations. Almost all DFI
had to be made through joint ventures with Indonesian partners and in most cases, majority control must be held by Indonesians within 15 years, although a five-year extension was possible. For certain cases, 100-percent and 95-percent foreign ownerships were allowed but scheduled divestments to Indonesian partners of at least 20 percent within 20 years were required.

14. A few leading MNEs helped establish joint training centers with the Economic Development Board to provide specific industrial skills. MNEs and local enterprises also have access to financial assistance from the Skills Development Fund for approved training programs for their employees. Under the Local Industry Upgrading Program, local SMEs were linked up with foreign MNEs to provide transfer of know-how and upgrade the local supporting industries. Generous tax incentives and grants are also given for research and development activities.

15. The recent adoption of IMF Article VIII requires the Thai government to deregulate foreign currency controls. Remittance requirements on all funds remain.

16. Certain restrictions exist in the Philippines on firms which export less than 60 percent of output and with equity less than US$500,000.

17. Time limit restrictions have recently been waived for top-level foreign posts including president, treasurer, and general manager.

18. For a detailed description of the pattern of DFI flows in ASEAN, see Yue (1993).


21. Due to data limitations, we are unable to evaluate implementation of the more recent investment code liberalization efforts.

22. See, for example, Guisinger and Associates (1985).


24. Unable to adjust for overlaps, we cannot calculate percentage of foreign affiliates impacted by investment measures of all types.


26. This includes U.S. laws which govern antitrust, mergers and acquisitions, corporate taxation, export controls, and health and safety standards.

27. Note that states are constrained in their ability to discriminate between nonstate residents and others by the interstate commerce clause of the U.S. Constitution.

28. Of nearly 800 reviewed transactions, only one had been blocked as of April 1993.


30. The Uruguay Round accord only covers TRIMs related to trade in goods.


33. See Guisinger (1993) for a description and analysis.


INTRODUCTION

Intellectual property rights (IPRs) have been a contentious issue for the United States and the ASEAN countries for the last 15 years. In the early 1980s, after it was determined that the ASEAN countries either had weak intellectual property (IP) laws or failed to take adequate measures to enforce them, the United States Trade Representative (USTR) began to threaten these countries with loss of their GSP (Generalized System of Preferences) status and other trade-related benefits if they did not take action to rectify the situation. In response to this pressure from the United States as well as the changing structure of their own economies, the ASEAN countries have strengthened their IP laws and taken significant measures to enhance IPR enforcement. More recently, the "Trade-Related Aspects of Intellectual Property Rights" (TRIPs) provisions of the 1994 Uruguay Round GATT Treaty represent a significant step on the road to IPR convergence by both developed and developing countries, as the TRIPs provisions commit all GATT signatories to establishing IPRs that meet specified minimum standards. The TRIPs provisions are important to the United States—ASEAN intellectual property discussion, as they will force the ASEAN countries to upgrade some IPR provisions by February 1995 and the remainder by February 1999.

This paper surveys the state of intellectual property law in the ASEAN countries, and presents a brief summary of major IPR issues in Mexico and the United States. We begin with an introduction to IPRs and their economic rationale. A review of the international treaties governing IPRs follows, with particular attention paid to the TRIPs provisions of the Uruguay Round GATT Treaty. The next section surveys the major patent, copyright, trademark, and design statutes in the five ASEAN countries and analyzes current controversies with respect to these laws. In subsequent sections, controversies with respect to U.S. IP law are reviewed; while the United States has pressured other nations to strengthen their own laws, several U.S. trading partners have noted that some aspects of U.S. law are problematic and do not conform to international standards. Mexico's commitment in the NAFTA treaty to upgrade its IP laws and their enforcement is also discussed. In the final section, recommendations for cooperation between the ASEAN countries are made; such cooperation, if resulting in a more harmonized system of IPR
legislation and enforcement within ASEAN, would be an important step towards enhancing the IPR environment for the region as a whole. At the same time, the report notes in the conclusion the need for reform of U.S. laws to conform to international rules and GATT principles.

INTELLECTUAL PROPERTY LAW AND ITS ECONOMIC FOUNDATIONS

The establishment of limited IPRs is as important for the process of economic development as the establishment of property rights in land, housing, and personal possessions. Where property rights for physical assets are improperly specified or nonexistent, the result will be an inefficient allocation of resources and a reduction in the growth of national income; the same is true of intellectual property. This is so because, unless defensive measures are feasible, other individuals and firms will use the intellectual innovation to produce additional units of a final product embodying the innovation. The resulting increased supply of the product reduces its market price, and thereby reduces the return to the original inventor from the creative activity. Inventors and artists respond to the lower return by developing fewer new technologies and products for producers and consumers to use. Alternatively, inventors may try to develop private mechanisms for excluding other individuals from using their new technologies or copying their creative works. However, to develop and enforce such a mechanism is usually very costly.

Thus, as long as innovative and creative activities are pursued in anticipation of the gains from marketing the fruits of these endeavors, limited IPRs are necessary conditions for individuals to have efficient incentives to create artistic works, develop new technologies, and market new products. The establishment of IPRs and an IP enforcement mechanism which utilizes the public court system raises the return to future innovative activity by reducing the cost of excluding nonpayers from using the work. Without IPRs, dynamic efficiency cannot be maintained; that is, artists, authors, musicians, and inventors would have reduced incentives to undertake creative activity, as future returns from such investments are lower in the absence of IPRs. (For a listing of the types of IPRs, see Box 4.1: The Major IPR Categories).

Intellectual property rights usually encompass some combination of three distinct types of rights: (1) the right to transfer the property, (2) the right to use the property as the owner sees fit (which includes the right to exclude other individuals from using the property), and (3) the right to derive income from the property. Each of these three rights is generally associated with greater economic efficiency. Transferability ensures that the property will ultimately be used by the individual who places the highest value on the property or will be managed by the person who can generate the highest net benefits from the property. The right to use the property ensures that the owner can use the property in the manner which maximizes the owner's welfare. This property right is often qualified if use of the property imposes costs on other individuals. The right to derive income from the property allows resource ownership to be separated from resource management. This specialization is common in modern corporations and can produce large efficiency gains in some situations.

Thus IP law generates net benefits to society in the form of an increased flow (reflecting both quantity and quality) of artistic works, production processes, and final products to the market. In addition to the increased flow of products, IP law also facilitates the transfer of information about new intellectual innovations into the public realm. By examining the patent, other inventors gain information and ideas which reduce the cost to them of developing other new ideas, inventions, artistic creations, and commercial products. That is, IP
Box 4.1: The Major IPR Categories

There are seven major IPR categories, each of which is usually governed by separate legislation and a body of judicial decisions interpreting the law. A *patent* provides the holder with the right to exclude other parties from using, selling, or manufacturing the product or process described by the patent for a specified number of years. A patent is not intended to protect new knowledge, but to protect the embodiment of knowledge in new products or manufacturing processes. A *copyright* provides the holder with the right to exclude others from reproducing the expression of an idea, such as a book, a song, or a painting. It does not protect the idea. A *trademark* establishes rights to a brand name or mark and excludes others from using it without permission. A *trade secret* is information that a business chooses to keep confidential that is critical to the success of the business. Trade secret protection provides protection against the appropriation of such information by competitors or potential competitors. A *mask word* protects certain aspects of the design of a semiconductor chip and is essentially a specialized type of copyright protection for semiconductor chips. *Plant breeders rights* grant exclusive rights to the holder to use and distribute new and clearly distinguishable varieties of plants. Finally, an *industrial design* grants the holder exclusive use of designs for such products as clothing, furniture, and appliances.

Property rights will only be effective in guiding individual behavior if they are enforced and if the public is aware of the scope of IPRs and how the IP system functions. Sufficient moral and economic penalties must be in place to deter individuals from violating property rights, and institutions that register the existence of IPRs and facilitate efficient enforcement must be in place. IPR enforcement by government agencies can only function effectively if enforcement agencies receive sufficient funding, while private systems of enforcement will work well only when an IPR holder is able to pursue a possible violation of IP law without dissipating all profits associated with the property. Thus, in the absence of a credible private or public enforcement system and accompanying registration institutions, IP statutes will be mere pieces of paper.

With respect to ASEAN, laws that are already on the books but not currently enforced provide a solid foundation for establishing an effective IPR system. Many of the problems with the IPR systems of the ASEAN countries stem from private enforce-
ment mechanisms that are either ineffective or too costly for most IPR owners to use.\textsuperscript{11}

**INTERNATIONAL INTELLECTUAL PROPERTY STANDARDS**

Although intellectual property rights regimes differ across countries, four major international IPR treaties (Paris, Berne, Washington, Rome) serve to coordinate the numerous IPR regimes. Since the 1994 GATT Treaty, these treaties have become even more important. The TRIPs provisions of the GATT Treaty mandate that all GATT signatories observe the most important features of these treaties even if the country had not previously signed the treaties. While phase-in periods are specified for developing countries, the effect is likely to be a fast convergence of IPR law between developing and developed countries. The significant provisions of these four major international IPR agreements are outlined below and the likely effects of the TRIPs agreement on the IP laws of developing countries are analyzed.

**INTERNATIONAL IPR AGREEMENTS**

International agreements governing IPR standards originated in the late nineteenth century. The 1883 Paris Convention for the Protection of Industrial Property covers inventions, trade names, trademarks, service marks, industrial designs, indications of source, and appellations of origin. The Convention has three main features: national treatment, right of priority, and "common rules." National treatment implies that each signatory is obligated to ensure that foreign applicants and owners of industrial property from other member countries enjoy the same rights and protection offered to its own citizens.\textsuperscript{12} By giving up the possibility of discriminating against foreign patents at home, a signatory country gains equal treatment abroad. Right of priority means that an applicant who has filed in a member state can, within a set timeframe (twelve months for patents and six months for trademarks and industrial designs), retain the filing date in another member country. Common rules include independently granted patents, trademark acceptance in other member states, and establishment of a central office for communicating information about industrial property to the public. The Convention does not, however, standardize the level of IPR protection. In fact, two early signatories to the Paris Convention, Switzerland and the Netherlands, did not have patent systems.\textsuperscript{13} While the Paris Convention has a dispute resolution mechanism, several nations have signed the convention only with the reservation that they will not adhere to the dispute resolution procedures.\textsuperscript{14}

As discussed further below, the incorporation of the major substantive provisions of the Paris Convention in the new TRIPs agreement should remedy the inadequate enforcement mechanisms in the international treaties. The Paris Convention is administered by the World Intellectual Property Organization (WIPO), an agency of the United Nations, and the United States, Mexico, and all ASEAN-5 countries except Thailand are members of WIPO. When Singapore joins the Paris Convention, all seven countries discussed in this paper will be members.

The Berne Convention for the Protection of Literary and Artistic Works covers copyrights and is similar in its coverage to the Paris Convention.\textsuperscript{15} Under WIPO's jurisdiction, the Berne Convention establishes national treatment of copyrights and automatic protection of foreign copyrights. It allows for copyrights to be established without formal registration or deposit procedures, and sets certain minimum standards for each signatory's copyright laws concerning the rights of authors and the duration of copyrights (50 years after the life of the author, 25 years for photographic works, and 50 years for cinematographic works). Exclusive rights include the right to copy or reproduce the work, the right to translate the work, the right to adapt or transform the work, and the right to transform the literary work into a motion picture. Derivative works, such as translations and musical arrange-
ments, are also protected under the Berne Convention. Most importantly, each member agrees to recognize copyrights established in the other member countries. However, a weakness of the Berne Convention (which is largely remedied in the new TRIPs agreement) is that it lacks any meaningful dispute resolution procedures. The United States joined the Berne Convention only in 1989; Mexico, Malaysia, Thailand, and the Philippines are now members.  

The Rome Convention (1961) refers to the "International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations." The Convention grants international protection to a performer if the performance takes place in another contracting country, is incorporated in a sound recording, or is carried by a broadcast protected by the Convention. National treatment for performers, producers, and broadcasters is the basis for the Convention's provisions. The Convention establishes minimum rights for performers and producers of sound recordings. In particular, performers are protected against the unauthorized broadcast of their public performance, producers of sound recordings have the right to authorize or prohibit direct or indirect reproduction of their recordings, and broadcasting organizations have the right to the fixation, reproduction, and rebroadcast of their broadcasts. A 20-year term of protection is specified. Of the seven countries considered in this paper, only Mexico and the Philippines are members.  

The Washington Treaty of 1989 refers to the "Treaty on Intellectual Property in Respect of Integrated Circuits" and provides protection to the layout-designs (topographies) of integrated circuits. The treaty holds that importing, selling, or otherwise distributing for commercial purposes a protected layout-design, or an integrated circuit incorporating a protected layout-design, is unlawful. If a producer of an integrated circuit has unknowingly reproduced a protected layout-design, he must pay to the right holder a reasonable royalty such as would be payable under a freely negotiated license. Protection must be no less than ten years from the date of application or first commercial exploitation (if unregistered). The industrialized countries have not ratified the Washington Treaty due to its provisions requiring compulsory licensing of layout designs if the design is not worked in the country.  

The Patent Cooperation Treaty (PCT), a special agreement under the Paris Convention, establishes a "rationalized procedure for the filing, searching and preliminary (substantive) examination of patent applications, and for the dissemination of the technical information contained in PCT published applications." While the process does not lead to an international patent, it reduces the costs incurred by an inventor to apply for a patent in many countries. The treaty also establishes a single priority date which is the date of the international application. In addition, the treaty provides an applicant with the option of delaying patent applications for 30 months during which test marketing or production of patented products abroad may begin. The Patent Cooperation Treaty is particularly important, as it reduces the large transaction costs associated with applying for patents, trademarks, and copyrights in foreign countries. By partially harmonizing the application and review process, this treaty represents the first step towards an international patent system. Only the United States, of the seven countries considered in this paper, is a member.  

The multilateral agreements described above suffer from two major deficiencies. First, they either have no mechanism to remedy disputes or the dispute resolution mechanism is ineffective, or some signatories have signed the agreement with the proviso that they will not adhere to the dispute resolution mechanism. The lack of an effective international enforcement system reduces the value of these agreements. Second, some treaties (in particular, the Paris Convention) provide for national treatment, but do not specify minimal standards of IPR protection. While the national treatment provi-
sion allows foreigners to have access to a foreign country’s courts to adjudicate IPR disputes, this may be of little value if the foreign court system works poorly or if the country’s IP laws provide weak protection for intellectual property. Thus, while such international agreements are useful in coordinating relationships between countries with strong IPR systems, their contributions are more limited in relationships between countries with weak IPR systems.

THE 1994 GATT TREATY’S TRIPS PROVISIONS AND DEVELOPING COUNTRIES

The Uruguay Round of the GATT produced the first GATT treaty to include provisions on trade-related intellectual property rights (see Box 4.2: The Major Features of the GATT TRIPs Agreement). These provisions are surprisingly strong and will force almost all countries to take some measures to strengthen various aspects of their IP laws. Developed countries have until February 1995 to implement the TRIPs agreement, and developing countries have an additional four years (until February 1999), with the exception of the national treatment and Paris Convention provisions which must be implemented by February 1995. Some developing countries are likely to forego the additional four years and proceed more rapidly to implement the agreement. One advantage of rapid implementation is to diffuse unilateral pressure from the United States to change IP laws or lose trade privileges. Developing countries with IP laws that closely approximate the TRIPs standard, such as Malaysia, are more likely to implement rapidly given their low costs of implementation and the benefits from being able to declare that they are in compliance with TRIPs.

While the TRIPs agreement will force most developing countries to strengthen their IP laws across all fields of intellectual property, the impacts will vary across the countries. Factors determining the impact include the country’s potential to attract foreign investment, whether the country’s firms are capable of developing patentable products and processes, and the popularity of domestic music, films, art, computer programs, and other literary works. Recent theoretical analysis has suggested that a strengthening of IP protection in developing countries “increases the rate of product innovation if foreign direct investment [rather than imitation] is the dominant channel of technology transfer.” However, some economists believe that the increased IPR protection will generate short-term losses for developing countries, as additional royalty payments to foreign firms will generate higher prices for consumers without producing more foreign investment or higher expenditures on research and development. In addition, in a recent empirical analysis of the response of foreign investment to stronger IP protection, variations in IPR protection were found to have little impact on foreign investment. For some more-advanced developing countries, it has been suggested that strengthened IP laws may have the effect of overriding strong domestic lobbies which have prevented the adoption of welfare-improving IP legislation.

One of the more controversial features of the TRIPs agreement is the requirement that countries provide some form of IPR protection for plant varieties. This is particularly important in the ASEAN countries, many of which still have large tropical rain forests containing thousands of unique plant varieties. The potential for developing additional plant varieties from the plants contained in these tropical rain forests is clearly present and could be the foundation for a thriving biotechnology industry in the near future. However, many ASEAN countries now ban the patenting of plant varieties and are not actively considering how to use this potentially rich resource. In this instance, the TRIPs agreement will force the ASEAN countries to reconsider this important issue and will (hopefully) induce some countries to adopt strong forms of protection for new plant varieties. The issue is, however, quite contentious, as some groups are afraid that IPR protection for plant varieties will restrict access to
rain forests and will raise production costs to domestic farmers.

A key question is whether developing countries will gain from the TRIPs agreement. While virtually all developing countries will incur short-term losses due to TRIPs, they will also enjoy gains in future periods. In addition, low-income developing countries are likely to incur net discounted losses, while high-income developing countries are more likely to incur net discounted gains. Nonetheless, one must also remember that the TRIPs agreement is part of the larger GATT agreement. Losses from the TRIPs provisions may be outweighed by gains stemming from increased access to markets in developed countries for agricultural, textile, and manufactured products. By their very nature, trade agreements include provisions which help particular sectors of a country's economy and provisions which hurt certain sectors. Thus, despite losses from the TRIPs agreement, the GATT agreement may still improve overall welfare within the developing country.

INTELLECTUAL PROPERTY RIGHTS IN THE ASEAN COUNTRIES

INDONESIA

IPR Legislation

Indonesia's first patent law was passed by the Parliament on November 1, 1989, and took effect on August 1, 1991. Under the 1991 law, which replaced ministerial regulations issued in 1953 that allowed only provisional filing of patent applications, a patent can be obtained for an invention that is new, contains an inventive step, and is industrially applicable (Article 2). In general, a patent has a 14-year term from the date of application (Article 9), but can be extended for an additional two years, thereby increasing protection to 16 years. However, a patent for a small product improvement, known as a "petty patent," is granted for a term of five years from the grant date and is not renewable. In addition, the patent law does not allow the patenting of new plant varieties or animal species; food and drink, including raw materials produced by chemical processes and used to produce food and drink for human and animal consumption; methods of examination, nursing, medication, and surgery; theory or methodology in the field of science or mathematics; and inventions contrary to public order, morality, or existing law (Article 7). Moreover, imports of patented products or articles are not protected by the patent law since a patent must be "implemented" in Indonesia (Article 20). A patent is subject to compulsory licensing if it is not used within three years of the grant date and is declared void if it is not used within four years of the grant date (Articles 81-94). Applications originating overseas must be made through a registered and accredited local patent consultant, while applications originating in Indonesia can be filed directly by the inventor. Applications must be filed in the Indonesian language, Bahasa Indonesian. For firms and individuals with patents in other countries, priority rights under the Paris Convention are recognized for 12 months after the foreign date of application. Patent transfers and licenses are allowed, provided they do not contain provisions harmful to the Indonesian economy or hamper the ability of Indonesian citizens to learn the patented technology. Registration of all patent transfers and licenses is required.

Although Indonesia's patent law recognizes pharmaceutical product patents, it does not contain any provisions for protecting products in the "pipeline," i.e., products that were developed prior to the patent law, but are coming to market now due to a long regulatory approval process. In fact, since the patent law became effective in 1991, no pharmaceutical patents have been issued, although the Patent Office is currently reviewing several applications for pharmaceutical patents. Foreign pharmaceutical companies argue that they are actually worse off since the new patent law was enacted, as they have lost administrative protection granted by Indonesia's FDA (Director General of Food and Drugs) which
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<th><strong>Box 4.2: The Major Features of the GATT TRIPs Agreement</strong></th>
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<tr>
<td>1.</td>
<td>GATT members must apply the principle of national treatment to all foreign IPR owners (Articles 1(3), 3).</td>
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<td>2.</td>
<td>All GATT members must comply with the central provisions of the following four conventions:</td>
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<tr>
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<td>a. the Paris Convention (Article 2(1));</td>
</tr>
<tr>
<td></td>
<td>b. the Berne Convention (Article 9(1)) without its moral rights provisions;</td>
</tr>
<tr>
<td></td>
<td>c. the Rome Convention (Article 14);</td>
</tr>
<tr>
<td></td>
<td>d. and the Washington Treaty (Article 35) with the modification that compulsory license of integrated circuit technology is prohibited.</td>
</tr>
<tr>
<td>3.</td>
<td>GATT members cannot exclude certain classes of products from being patented (with a few exceptions set forth in the treaty). This means that GATT members must allow patenting of pharmaceutical products (Article 27(1)).</td>
</tr>
<tr>
<td>4.</td>
<td>Countries must protect patents for 20 years from the date of application (Article 28).</td>
</tr>
<tr>
<td>5.</td>
<td>Patent holders no longer have an obligation to work their patent locally if they supply the market's demand for the good with imports (Article 28).</td>
</tr>
<tr>
<td>6.</td>
<td>Pharmaceutical products which are in the pipeline—i.e., were developed earlier and are just now completing the safety and efficacy procedures to come to market—must receive at least five years of protection (Articles 70(8), (9)).</td>
</tr>
<tr>
<td>7.</td>
<td>GATT members must adopt either a patent system or a sui generis system for protecting plant varieties (Article 27).</td>
</tr>
<tr>
<td>8.</td>
<td>The detailed enforcement procedures specified in the GATT must be incorporated into each member's national laws (Article 41).</td>
</tr>
<tr>
<td>9.</td>
<td>GATT members must adopt stricter enforcement measures, including border controls, to prevent imports of counterfeit goods (Articles 51–60).</td>
</tr>
<tr>
<td>10.</td>
<td>Compulsory licensing of trademarks as well as local linkage requirements have been eliminated (Articles 15–24). Marks may be assigned with or without the transfer of the business to which the trademark belongs.</td>
</tr>
<tr>
<td>11.</td>
<td>Copyright protection of computer programs (10(1)) and data bases (Article 10(2)) is required. All computer programs must receive at least 50 years of protection (Article 12).</td>
</tr>
<tr>
<td>12.</td>
<td>All GATT members are required to protect trade secrets (Article 39).</td>
</tr>
<tr>
<td>13.</td>
<td>GATT members must protect original industrial designs for at least ten years (Article 26).</td>
</tr>
</tbody>
</table>
Box 4.2: The Major Features of the GATT TRIPs Agreement (continued)

14. Authors and their successors in title have the right to authorize or prohibit the commercial rental to the public of originals or copies of their copyrighted works (Article 11). The substantive effect is to allow copyright owners to charge royalties or other fees for commercial rental of their works.

15. Service marks as well as trademarks must be protected (Article 15).

16. Commercial data submitted for regulatory approval of pharmaceutical or agricultural chemical products shall be protected against unfair commercial use (Article 39).

17. The infringer has the right to be paid damages and his expenses, "which may include attorney's fees" (Article 48).

18. Protection for "geographical indications" of the region or locality of a good's ownership is required (Articles 22-24). Special provisions are mandated for geographical indications for wines and spirits.

19. Reservations concerning TRIPs provisions may not be entered without the consent of the other GATT signatories (Article 72).

provided for two-to-three years of protection. Article 21 (supported by Government Regulation Number 32 of 1991) specifies that 50 raw materials widely used by the domestic pharmaceutical industry cannot be patented and can be freely imported. Since the law allows administrators to place additional products in this category, foreign pharmaceutical firms are concerned that these provisions could be used to exempt new pharmaceuticals from patent protection. Pharmaceutical firms have also complained about the 14-year term of patent protection, noting the excessively long time required to obtain safety and efficacy approval from the United States FDA and then the Indonesian FDA. Indonesian regulatory authorities have responded that they are working to reduce the time required to obtain approval in Indonesia from three years to one year.

After gaining independence from the Netherlands in 1950, Indonesia used the colonial Auteurswet of 1912 as its copyright law and was a signatory to the Berne Convention. However, the colonial copyright law was generally not enforced, and in 1958, Indonesia withdrew from the Berne Convention to obtain cheaper access to published international works. Soon thereafter, in the early 1960s, Indonesian publishing houses and the domestic entertainment industry began to lobby for a stronger copyright law and Indonesia's basic copyright law was passed in 1982. Despite the new copyright law, widespread piracy continued until the copying of "Live Aid" audio tapes (for which the sales proceeds from copyrighted tapes were donated to international organizations bringing food supplies to victims of famine in Africa) in 1985 and 1986 brought unwanted international attention to Indonesia. The controversy surrounding this incident combined with a growing reputation as a "pirater" of copyrighted works and pressure from the U.S. government induced the Indonesian Parliament to amend the copyright law in September 1987. Important changes
included extending the term of copyright protection; adding the categories of "computer programs," "voice and sound recordings," and "video recordings" to the list of protected works; increased criminal penalties for infringement; and changes in the provisions for compulsory licensing of translated works.

Currently, Indonesia's copyright law states that a copyright is an exclusive right "for the creator...to publish [and/or] reproduce his creation as well as to grant therefor without prejudice to restrictions under prevailing laws and regulations" (Article 2). The copyright term is 50 years plus the life of the author for written works, paintings, carvings, sculptures, calligraphy, choreography, batik, architectural works, and musical works; 50 years for films, radio or TV broadcasts, lectures, lessons, speeches, and performances; and 25 years for photographs and computer programs (Articles 26-27). Copyrights need not be registered to be valid, although registration with the government may reduce the cost of later legal enforcement. Registered copyrights may only be transferred in whole (rather than in part), and the transfer is valid only if it is in writing.

To obtain a copyright, a person must be an Indonesian citizen or corporation; a citizen or corporation of another country and the work is first published in Indonesia; or a citizen of a country with a bilateral copyright agreement with Indonesia (Article 48). In mid-1988, the European Community and Indonesia signed a bilateral copyright agreement which covered sound recordings. In March 1989, the United States and Indonesia established bilateral copyright relations which extended Indonesian copyright protection to U.S. citizens (enforcement of the law began in August 1989). Indonesia has not yet rejoined the Berne Convention.

Indonesian trademark law, which dates back to Trademark Law No. 21 of 1961, has a longer history than Indonesian copyright or patent law. In the mid-1980s, foreign companies began to complain that the law allowed the appropriation of famous company trademarks by Indonesians unconnected with the firms owning the trademarks. In response to these complaints, the Minister of Justice in 1987, and again in 1991, ordered the Trademark Office to reject applications to register well-known trademarks or trademarks similar to well-known marks. In addition, Indonesian embassies around the world compiled lists of well-known marks to ensure their registration only by the original owners or by those having license agreements with the original owners.

In 1992, the Indonesian Parliament enacted a new Trademarks Law, effective April 1, 1993. Major changes include basing the right to a mark on registration rather than use; defining a trademark explicitly; expanding the scope of the law to service and collective marks; and regulating the licensing of marks. These changes imply stronger protection for well-known foreign and Indonesian trademarks and also protect against the use of marks that are very similar to well-known marks (Article 88). The right to use a distinguishing mark on goods is acquired upon the registration of the mark by the owner of the mark (Article 3), and a General Register of Marks is maintained by the government. Although registration procedures are simple, they can take as long as 8-19 months to complete. The trademark has a ten-year term and can be renewed for an indefinite number of terms so long as it continues to be used for the goods or services contained in the trademark certificate (Articles 7, 36-39). Foreigners must apply for trademark registration through a proxy in Indonesia. Priority rights in another country are recognized when the application is submitted not later than six months from the receipt date of the application for the registration of the trademark in the first country (Article 12). Mark transfers must be registered with the Office of Marks and published in the General Register of Marks. Some restrictions exist on transferring service trademarks if "the method of rendering services and the results thereof are very closely connected with the personal abilities or skills of the provider of the service concerned" (Article 43).
Licensing of marks is permitted, but licenses must be registered with the Office of Marks and are subject to government approval. Trademarks in existence prior to the 1992 law continue to be valid for their remaining registry period, and renewal will be conducted under the terms of the new law.

Indonesia has no statutory law protecting trade secrets. Firms can, however, protect confidential information via detailed written contracts with their employees. Nevertheless, trade secret protection is effectively limited by the failure of Indonesian courts to apply sufficient penalties for breach of confidentiality contracts. Carl-Bernd Kaehlig, a leading expert on Indonesian IP law, has observed that "[s]o far in Indonesia, there has not been a single successful court case involving damages for breach of a confidentiality clause (or agreement)."

**Enforcement**

Patent owners have the right to file a claim for compensation with the local District Court against an infringer (Articles 97–99, 121–125) and may also file a claim for delivery of the infringing products or their equivalent value. A judge has the power to order the defendant to cease infringement while investigation proceeds. The burden of proof is on the patent holder to prove that the defendant unlawfully used the patented product. Officials in the Department of Justice and the police have investigative authority. Patent infringers are subject to a prison term of up to seven years and a fine not more than Rp100,000,000. Criminal prosecution for intentional violation of patent rights is allowed.

Trademark owners have several enforcement options. If the trademark is well-known and a second party has been awarded the registration, the trademark owner can petition for the trademark's cancellation. Owners of registered trademarks can also bring suit against individuals or corporations in the form of a claim for compensation or a halt to the use of their trademarks or unrightfully similar trademarks. Criminal provisions specify imprisonment for up to seven years depending on the severity of the offense and a maximum fine of Rp100,000,000.

Copyright owners can bring suits asking (1) that copyright-infringing goods be seized and (2) that compensation be paid for copyright violation. A civil claim does not prejudice criminal prosecution. Criminal sanctions for violation of the copyright law include a maximum punishment of seven years in prison and/or a fine of Rp100,000,000. The police share investigative powers with copyright investigators in the Department of Justice who have broad powers to investigate alleged violations, seize evidence, request information, and arrest suspects.

**Current Issues**

During the early 1990s, the USTR designated Indonesia as a Priority Foreign Country due to its lack of a patent law, continuing copyright difficulties, trademark violations, and limitations on motion picture access. Despite Indonesia's progress in writing and implementing IPR legislation over the last six years, in 1994 Indonesia remains on the USTR Watch List. Nonetheless, the USTR has praised the government's recent enforcement efforts, observing that "[the Indonesian] government is fairly responsive to U.S. companies which put forward specific complaints about pirated goods and trademark abuse."

With respect to trademarks, several controversies have generated recent court cases in Indonesia (see Box 4.3: Recent Trademark Controversies). In some instances, Indonesian courts recognized the rights to a famous trademark as belonging to the foreign owner of the trademark, while in other instances, the courts ruled in favor of the Indonesian firm which had registered the famous trademark for use in Indonesia.
Box 4.3: Recent Trademark Controversies

- In February 1994, the Central Jakarta District Court ruled that an Indonesian firm, PT Makmur Perkasa Abadi (PT MPA), had the rights to the "Levi's" trademark. Levi Strauss Co. has appealed the decision to Indonesia's Supreme Court.1

- Cardin et Dunhill, a design firm with the rights to the Pierre Cardin name, has also protested against the use of its name by PT MPA. In February 1994, an Indonesian court ruled that PT MPA must give up its Pierre Cardin license when it expires in 1997. Until that time, however, both the Indonesian firm and Cardin et Dunhill have the rights to use the Pierre Cardin name.2

- The trademark law was bolstered on July 13, 1994 by the decision of the Central Jakarta court declaring that the French firm, Guy Laroche, was the sole holder of the Guy Laroche trademark. PT Makmur Perkasa Abadi (PT MPA) had used the Guy Laroche mark on its clothes and accessories since 1977 when it claimed the Guy Laroche mark under Indonesia's 1961 law. In its decision, the Central Jakarta court cancelled PT MPA's registration of the trademark.3

- Disney has recently cracked down on Indonesian companies' use of its cartoon characters. Disney meets with the alleged violators and asks them to stop using the characters (or to obtain a license) and apologize to the public. If this approach fails, Disney follows with civil lawsuits asking for damages and petitions the authorities to bring corresponding criminal actions.


Enforcement of copyright protection has been most visible in computer software. In 1994, a series of highly-publicized police raids on retail stores selling unauthorized copies of consumer software helped to create public awareness of the problem of counterfeiting. Recent interviews with foreign computer software firms indicate that piracy of software is on the decline.35

The U.S. motion picture industry is pleased that piracy of films and videos has declined in recent years. Nonetheless the industry complains that access to the Indonesian market is limited due to several factors including a restriction on the number (88) of foreign films released annually in Indonesia, high import levies, and a requirement that film distributors and exhibitors be 100-percent Indonesian-owned. The industry has asked the USTR to use the Special 301 law to pressure Indonesia to relax these restrictions. Such use of Special 301 is, however, highly questionable, as the relevant issue is protection of the Indonesian film industry rather than a lack of copyright protection for films and videos.

TRIPs Harmonization

Indonesia's patent, trademark, and copyright laws all have significant features which are at variance with TRIPs provisions. First, the term of protection from the time of the patent filing (14
years, extendable to 16 years) is less in Indonesia than the GATT minimum term of 20 years (Article 33). Second, plant varieties are not protected by Indonesian IPR law, and TRIPs (Article 27) mandates either patent protection or sui generis protection for plant varieties. Third, under TRIPs (Article 27) imports satisfy the requirement to work a patent, while Indonesia's patent law specifically prohibits imports from satisfying this requirement. Fourth, computer software is protected for only 25 years under Indonesia's copyright law, while TRIPs (Article 12) mandates at least 50 years of protection. Fifth, Indonesian IP law does not protect industrial designs, while TRIPs (Article 25) mandates industrial design protection. Sixth, Indonesia, like most other countries, does not protect layout-designs of integrated circuits, while TRIPs (Articles 35–38) mandates such protection. Seventh, TRIPs requires protection of data bases, a topic which Indonesian law does not address. Eighth, TRIPs requires protection for geographical indications of product origin and mandates specific rules for geographical indications pertaining to wines and spirits. Indonesian IP law does not explicitly incorporate protection of geographical indications. Ninth, Indonesia, like all other countries, must modify its laws to embody GATT's enforcement procedures. Tenth, Indonesian copyright law does not confer rental rights on owners of computer software and video films—TRIPs mandates that each country's copyright law allow for rental rights. Finally, TRIPs mandates that certain provisions of the Berne Convention (Article 9) be incorporated into each member's copyright law. Under TRIPs' developing-country exemption (Article 65), Indonesia has five years to implement the TRIPS agreement (with the exception of the application of the Paris Convention provisions on patents, trademarks, and industrial designs which must be implemented within one year).

In July 1994, Jakarta indicated that it is reviewing all three major IP laws and that it has sought technical assistance from the European Patent Office to revise its IP laws in accordance with GATT standards. The Economic Law and Improved Procurement Systems (ELIPS) Project, a joint venture of the Government of Indonesia and USAID, is also focusing on the adaptations required in Indonesian IP law to bring it into conformity with the new GATT treaty and to ensure that Indonesian personnel are adequately trained to administer and enforce IP laws.

Summary
Over the last eight years, Indonesia has made tremendous progress in establishing and upgrading its IP laws and enforcement activities. Nonetheless, the changes required to conform with the TRIPs agreement are substantial and will require a high rate of institutional change over the next five years. Authorities are currently devoting more resources to detecting and pursuing violations of IP laws, and the heightened enforcement activity has contributed to a substantial reduction in IPR violations. However, IPR violations persist at a relatively high rate, and over the next five years foreign corporations will be forced to devote significant resources to enforcement to secure their IPRs in Indonesia.

SINGAPORE
IPR Legislation
Under the current patent law (Chapter 271), patent rights are obtained in Singapore after a patent has been obtained in Great Britain or under the European Patent Convention (designating the United Kingdom as one of the countries for protection). Once it has been ascertained that the British patent was obtained within the last three years, a Certificate of Registration is issued.

New patent legislation (the Patents Act 1994, introduced in Parliament on February 23, 1994) is currently being considered by Singapore's Parliament. The Patents Act 1994 would abolish the link with Great Britain and establish a system for examining patents in Singapore. An invention would be patentable if it is new, involves an inventive step, and is capable of industrial application. However,
discoveries, scientific theories, mathematical methods; literary, dramatic, musical or artistic works; schemes for playing games or doing business; computer programs; methods of human and animal treatment; and the presentation of information cannot be patented. Plant and animal varieties can be patented. A patent application filed under the Patent Cooperation Treaty receives a priority right in Singapore from the date of application. Since Singapore has committed to join the Paris Convention, a patent applicant from a foreign country that is a signatory to the Paris Convention would have a priority right for 12 months from the date of the foreign application.

The Copyright Act of 1911 (a law of the United Kingdom incorporated into Singapore's laws) was clearly outmoded by the mid-1980s, as it did not cover computer software, specified relatively low penalties for copying copyrighted works (the maximum fine was S$1,000, with two months imprisonment for a repeat offense), and contained provisions limiting effective enforcement by private parties. After strong pressure by the American and British governments, the Singapore Parliament enacted a new Copyright Act in January 1987 (Act 2 of 1987 or Chapter 63) which was supplemented by six sets of regulations (1990 ed.). Bilateral copyright agreements with the United States, Australia, and Great Britain were also concluded in 1987. A Copyright (Amendment) Bill was introduced in Parliament on July 25, 1994. Among other things, the proposed amendments would resolve an existing controversy over parallel imports of copyrighted products by allowing parallel imports of goods that were manufactured with the consent of the foreign or Singapore copyright holder (Clause 4).

Infringement occurs when reproductions are imported, sold, or made without the consent of the copyright holder (Sections 31-34). Some exceptions to the general rules on infringement are itemized. Performance of a musical work by students on the premises of their educational institution is not deemed to be an infringement (Article 23). Multiple copying of a work for teaching purposes by an educational institution or an institution assisting handicapped readers is allowed, subject to record-keeping and within quantitative limits specified in the Act. If the owner of the copyrighted work requests (in writing) compensation from the educational institution, equitable remuneration as agreed between the parties or determined by the Copyright Tribunal (see Box 4.4: Copyright Tribunal) shall be paid (Article 52). The Newspaper and Printing Presses Act allows government agencies to photocopy works copyrighted by a foreign copyright holder without infringing on the copyright.

Singapore is not a member of the Rome Convention but has committed to join the Berne Convention. Until Singapore joins the Berne Convention, a foreign copyright is recognized in Singapore only if the copyright subsists in the United States, Great Britain, or Australia. If the copyright holder subsists in another foreign country, the copyright holder has 30 days to publish the copyright in Singapore or the
Box 4.4: Copyright Tribunal

A Copyright Tribunal, which was established to assist in the enforcement of Singapore's copyright law, consists of a President appointed by the Minister and two-to-four additional members. The Tribunal decides on the royalties payable with respect to records of musical works; the equitable remuneration payable to the owner of the copyright in a work copied by educational institutions; and reviews applications to bring a license scheme (such as copying by an educational institution) into operation (Sections 149-170).

United States, the United Kingdom, or Australia. When Singapore becomes a signatory to the Berne Convention, copyright holders in other countries will receive full protection.

Designs can be registered under the United Kingdom's Registered Designs Act of 1949, and this protection lasts for 25 years. By virtue of the United Kingdom's Designs (Protection) Act (Chapter 389), any design registered in the United Kingdom under the Registered Designs Act 1949 or any Act amending or substituted for that Act shall enjoy in Singapore like privileges and rights as though the certificate of registration in the United Kingdom had been issued with an extension in Singapore. Some designs cannot be registered under the Registered Design Act, but can be protected under the Copyright Act. Sales or assignments of design registrations must be registered at the patent office in Great Britain.

The Trade Marks Act (Chapter 332) was amended by the Trade Marks (Amendment) Act 1991, and new procedural rules were promulgated, effective from March 1991. A trademark is registrable if it contains either the name of a company, individual, or firm represented in a special or particular manner; the signature of the applicant; an invented word or invented words; a word having no direct reference to the character or quality of the goods or services; or any other distinctive mark. Service marks are also registrable (Article 10). The Registrar of Trade Marks keeps two registries of trademarks which include all registered trademarks. Registration is important, as the Trade Marks Act does not allow any legal action to prevent an infringing act or to recover damages from an infringement of an unregistered trademark (Section 49). A new and distinctive trademark can be registered for a period of ten years and can be renewed for an indefinite number of ten-year terms (Section 32). A trademark can be assigned or transmitted with or without the goodwill of the business in which it is used (Article 42). If a trademark owner had no intention to use the trademark in Singapore or if it has not been used for a continuous five-year period, then the registered trademark can be removed from the Registry (Section 40). J.C. Penny, which does not use its brand name in Singapore, lost the trademark on its name when it could not show use. On the other hand, R.C. Macy & Co. was able to retain its trademark registration despite not using its trademark on department stores in Singapore because it has had a representative office in Singapore since 1982.

Enforcement

Under the pending patent legislation, patent owners can bring civil suits to recover compensatory damages or the profits derived from the infringement; to obtain an injunction against the infringer; to obtain an order to deliver up or destroy infringing products; and to obtain a declaration by the infringer that the patent is valid and has been violated by the infringer (Article 67). For alleged violators of
process patents, the burden of proof is (in most cases) on the violator to show that he has not violated the process patent (Article 68). If an infringer did not realize that he was violating the patent and had no reasonable grounds for supposing that the patent existed, neither damages nor lost profits are awarded (Article 69).

The Copyright Act allows copyright owners to bring an action for an infringement of a copyright (Article 119). A court may grant the owner an injunction and either damages or an account of the infringer's profits. If the infringer was unaware that his activity was an infringing activity, then the copyright owner cannot recover damages, but can recover an account of the infringer's profits. The court may also order that any infringing copy or device used or intended to be used to make an infringing copy be delivered up to the copyright owner (Article 120). The Act also specifies criminal penalties for copyright violations. More specifically, a person who knows, or ought reasonably to know, that he imports, makes, sells, or exhibits infringing works is subject to a fine of S$10,000 for each infringing article up to a maximum fine of S$100,000 and/or imprisonment for up to five years. Penalties for the for-profit performance of a literary, dramatic, or musical work in public or for copying sound recordings or audio-visual productions are lighter—a fine of up to S$20,000 and/or imprisonment of up to two years (Article 136). Advertising that a copy of a computer software program can be purchased is also illegal and subject to a S$20,000 fine and/or imprisonment for up to two years. Private citizens can initiate criminal investigations by presenting information to a court. If information is given under oath by a copyright owner to a magistrate that there is reasonable cause for suspecting infringing activity at a location, the magistrate may issue a warrant for a police officer to enter the premises and search for and seize any infringing copies, plates, or contrivances used to make copies (Article 136).

The Trade Marks Act specifies criminal penalties for counterfeiting a trademark or service mark, making or possessing an instrument for counterfeiting, or importing counterfeit goods (Articles 69–74). The penalty is a fine of up to S$100,000 and/or up to five years imprisonment. Counterfeit goods are forfeited upon conviction. Owners of registered trademarks have the right to bring civil suits for damages and to obtain an injunction against an alleged trademark violator.

Passing-off is also an illegal activity in Singapore. The firm bringing the action must be able to show, however, that it has established a reputation and that the second firm engaged in "passing-off" activities is damaging the first firm's goodwill. Purchase orders contrived by the first firm to catch the second firm "passing-off" its products as those of the first firm can be used to provide evidence for such an action. Search warrants can be issued if sufficient evidence is available to the Court. Compensatory damages can be awarded upon conviction.

Current Issues

The USTR currently identifies "significant" problems with enforcement of Singapore's IP laws, with illegal use, copying, and distribution of computer software heading the USTR complaint list. Raids by the Business Software Alliance (BSA) in April 1993 yielded S$500,000 of software. Included among the seized programs was DOS6.0 which had not been released in Singapore and had only been released ten days earlier in the United States. However, the Singapore government has recently engaged in several successful criminal prosecutions against software pirates, with the convicted parties receiving nine-month jail sentences and being held liable for payment of prosecution costs. In 1994, computer software enforcement took a new direction, with the BSA conducting raids on electronic bulletin board services that download copyrighted computer software including Microsoft's popular software which is the most commonly infringed item.
Piracy of videocassettes is another problem in Singapore and is reportedly widespread. To address this problem, the U.S. motion picture industry has asked the Singapore government to require that the Singapore Board of Film Censors only approve films and videos for release when the Singapore distributor possesses the relevant copyrights.

With respect to patents, U.S. pharmaceutical companies have complained that the Singapore Government does not recognize as patent infringement the importation of patented medicines by government hospitals from unauthorized sources.

In another recent example, the Walt Disney Co. has been conducting an aggressive IPR enforcement campaign in Singapore with respect to the use of its cartoon characters. Investigators who find firms allegedly infringing on Disney's IPRs send cease-and-desist letters with demands for damages and a public apology to Disney. Those firms who ignore the letters are referred for criminal prosecutions. As of May 1994, over 200 cease-and-desist letters had been sent, and 20 criminal cases are proceeding.

**TRIPs Harmonization**

Singapore will need to make only a few changes in its IP laws to conform to the TRIPs agreement. First, since the country has not yet joined any international IP conventions, it must follow the TRIPs mandate to incorporate specified provisions from the Berne, Paris, Rome, and Washington treaties into its IP laws. Second, Singapore copyright law does not confer on owners of computer software and video films the right to authorize or prohibit rental of their works, and TRIPs requires that each signatory’s copyright laws embody rental rights. Third, TRIPs requires protection of data bases, a topic which Singapore law does not address. Fourth, TRIPs requires protection for geographic appellations and mandates specific rules for geographic appellations pertaining to wines and spirits. Finally, Singapore, like all other countries, must modify its laws to embody GATT's enforcement procedures.

**Summary**

Singapore's laws have been upgraded in recent years to provide rights similar to those specified in the United States. The changes mandated by TRIPs are minor and should be relatively easy to legislate and implement. Foreign corporations complain primarily about the Singapore government's emphasis on law enforcement by IP owners, arguing that the process is costly and time-consuming. Of course, such enforcement will also be time-consuming and costly for government prosecutors, and it is not readily apparent whether government assumption of an increased responsibility for law enforcement would be more efficient. However, given the disadvantage which foreign defendants often face in the domestic courts of virtually all countries, it is vital that domestic governments initiate prosecutions in serious IPR cases to ensure that potential violators are sent strong signals that the law will be enforced.

In sum, despite moderate problems with illegal copying of copyrighted products, particularly computer software, Singapore has established a well-functioning system of IP law and enforcement that is comparable with IPR regimes in OECD countries.

**MALAYSIA**

**IPR Legislation**

Prior to 1986 there were three similar patent laws in force in Malaysia, one applying to the States of Malaya, one to the territories of Sabah, and one to the territories of Sarawak. A uniform standard was established by the Patents Act 1983 (Act 291) which established a patent system applicable throughout Malaysia, effective October 1, 1986. The Act is supplemented by regulations issued in 1986 (and amended in 1990 and 1993) which spell out various administrative procedures in greater detail. Malaysia has been a member of the Paris Convention since 1989.
An invention is patentable if it is a process or a product that is new, involves an inventive step, or is industrially applicable (Section 11). The Patent Act was amended in 1993 to amend the standard for a "new" invention. Previously an invention was not new if a publication relating to the invention had appeared anywhere in the world, but use of the invention in other countries was not considered; under the amended law an invention is considered to be not new if a publication relating to the invention has appeared anywhere in the world or the invention has been used.

Plant and animal varieties cannot be patented, although patents can be given for man-made living microorganisms, microbiological processes, and the products of microbiological processes (Section 13). Discoveries, scientific theories, mathematical methods, schemes for doing business or playing games, and methods for the treatment of the human or animal body by surgery or therapy, and diagnostic methods also cannot be patented. Since Malaysia's patent law has allowed pharmaceutical process product patents since the early 1980s, the issue of "pipeline protection" is absent. A patent has a duration of 15 years from the time of the grant (Section 35).

Some inventions are classified as utility innovations which include "any innovation which creates a new product or process, or any new improvement of a known product or process, which can be made or used in any kind of industry, and includes an invention" (Section 17 and Second Schedule). A utility patent has a five-year term and is renewable for two additional five-year terms upon proof of commercial and industrial use in Malaysia. The purpose of the utility innovation is to provide protection to inventors who make small improvements on existing inventions.

The patent law allows applicants (from countries adhering to international patent treaties) who have filed a patent application with national, regional, or international bodies the priority right for a period of 12 months following the application (Section 27). The patent must be renewed annually by the payment of a fixed fee. Patents can be freely transferred, assigned, or licensed; however, all of these transactions must be recorded by the Registrar of Patents (Section 39). Patent rights extend only to uses for industrial and commercial purposes and do not apply to uses for scientific research (Section 37). Patents which are not worked in Malaysia are subject to compulsory licensing (Sections 48–54). A Patent Board, consisting of representatives from various ministries, considers applications for compulsory licenses, appoints examiners, issues certificates for utility innovations, and advises the Minister of Domestic Trade and Consumer Affairs who is charged with the responsibility for intellectual property.

Copyrights are granted under the Copyright Act 1987 (Act 332) as amended in 1990. In October 1990, Malaysia joined the Berne Convention. Copyrights subsist in every work eligible for copyright including literary works, musical works, artistic works, films, sound recordings, and broadcasts (Section 7). Computer programs and compilations of computer programs are protected as a type of literary work (Section 2). The first publication or broadcast transmission or erection of a work of architecture in Malaysia establishes a copyright. Since Malaysia joined the Berne Convention, first publication, broadcast, or erection of a work of architecture in countries who are members of the Berne Convention also establishes a copyright in Malaysia.

Copyright duration in any artistic, musical, or literary work is generally set at the life of the author and 50 years after his death (Section 17). Sound recordings, broadcasts, and films have a copyright term of 50 years from the time of first publication or broadcast. Copyright assignments must be in writing, but nonexclusive licenses can be entered into orally. There is no requirement to register copyright transfers or licenses.
The copyright law sets up a Copyright Tribunal, a government-appointed council of 20 members, which has the power to authorize the translation and publication of a literary work written in any other language into the national language (Sections 28-35). A license may only be granted when the owner of the copyright has not published a translation in the national language within one year of publication, and negotiations with the copyright owner for permission to publish a translation of the work have failed.

Trademarks can be registered under the Trade Marks Act 1976 (Act 175), which is supplemented with a set of regulations promulgated in 1983. Trademarks must be distinctive; that is, they must distinguish the goods with the mark from goods produced by other firms (Section 12). Registrations are valid for seven years (Section 32) and can be renewed for additional terms of 14 years (Section 41). Tentatively, beginning in January 1995, registrations are valid for ten years and can be renewed for additional terms of ten years. Corporate trade names must be registered under the Companies Act of 1985, and partnerships and other businesses must register their names under the 1956 Registration of Businesses Act. Trademarks can be freely transferred or assigned unless the transaction does not include the goodwill of the business or unless the use of the trademark by several parties is likely to confuse consumers (Section 55). Well-known trademarks in other countries are not recognized unless they are actually used in Malaysia. The Trade Marks Act was amended in 1993 to allow service marks to be protected. Regulations implementing the new service marks are expected to be promulgated in 1995.

Industrial designs can be registered under Great Britain's 1949 Design Act. The Design Act gives the owner the exclusive right to use, sell, and produce a design that is new and original. The period of protection is 25 years. Design transfers must be registered in Great Britain if they are to be recognized as valid by a Malaysian court. The Malaysian government is currently preparing legislation to replace this system with a domestic system of industrial design protection. It is expected that design legislation will be enacted in 1995, and that the new registry will become operative in 1995 or 1996.

**Enforcement**

The Patents Act has infringement provisions which allow the patent holder to institute court proceedings against an individual who has infringed or is infringing the patent (Section 59). Once the patent owner has proved infringement, the court shall award damages and grant an injunction to prevent further infringement (Section 60). An individual who falsely claims that he has a patent for a product or process can be fined, upon conviction, up to M$15,000 and imprisoned for up to two years.

Copyright infringement occurs when any person does, without the license of the copyright-holder, an act whereby the doing of the action is controlled by the Copyright Act. These acts include the reproduction in any material form for distribution of the copies of the work to the public by selling, leasing, or lending. There is also infringement of copyright by importing into Malaysia without the consent or license of the owner of the copyright. A copyright holder can bring suit for infringement and obtain an injunction and receive damages as warranted by the evidence. Infringing copies can be confiscated. Criminal conviction for infringement can lead to penalties of up to M$10,000 for each infringing copy and imprisonment of up to five years for the first offense. For subsequent offenses, the penalty is M$20,000 for each infringing copy and imprisonment of up to ten years.

The Trade Descriptions Act makes it illegal to use a false trade description on goods supplied to the market: this includes usage of a trademark without the owner's permission. The Act allows "enforcement officers to enter premises and inspect
and seize products bearing false trade descriptions." The Enforcement Division has over 400 enforcement officers to carry out investigations and prosecutions. Penalties for violation of the Act range from a fine of up to M$100,000 and up to three years imprisonment. Penalties are doubled for any subsequent offenses. The Act allows for the forfeiture of goods. Civil remedies are also available under the law of passing-off.

Trademark infringement is subject to criminal prosecution under the Trade Descriptions Act of 1972; in addition the trademark owner can bring a private suit against the infringer. If his action is successful, the trademark owner is entitled to costs and is sometimes awarded full legal costs, depending on the circumstances. A Trade Description Order (see the Singapore section) can also be obtained. Since it lasts for five years and is valid against all and sundry, it can be a useful tool for solving infringement problems.

Current Issues

Although Malaysia was on the USTR's Priority Watch List in 1989, by 1994 the USTR was generally satisfied with IP statutes and enforcement efforts in Malaysia. Current USTR complaints include the short term of protection for patents (15 years); the government's option to grant a compulsory license to a domestic company for production of a patented pharmaceutical (an option which has never been exercised); some videotape piracy; unauthorized public exhibitions of pirated videotapes and laser discs; and a backlog of copyright cases in the courts.

While there is some concern by U.S. movie distributors over illegal copying of videotapes and by brand-name producers over cross-border smuggling of counterfeit goods, the magnitude of these problems has been declining and is relatively small. Trademark violations continue to induce complaints by foreign trademark owners. For example, there have been complaints concerning the illegal use of the "James Dean" name. A backlog in the courts has been cited by some U.S. corporations as an impediment to enforcement.

TRIPs Harmonization

Revision of Malaysia's IP laws will be necessary to comply with the TRIPs agreement. The Ministry of Trade and Domestic Affairs is currently reviewing the country's IP laws to determine what changes are needed to conform with TRIPs. First, TRIPs requires that a system be put in place to allow patent or sui generis protection for plant varieties, for which Malaysia currently does not allow patent protection. The Ministry of Trade and Domestic Affairs and the Ministry of Agriculture are studying the Union for the Protection of Plant Varieties (UPOV) Convention (revised in 1991) as a possible model for a system of protection and will be preparing legislation to meet the TRIPs mandate. Second, the patent term of 15 years after the date of its grant may be incompatible with the TRIPs mandate that the patent receive 20 years of protection from the date of application. Third, Malaysia must incorporate the terms of the Washington Treaty protecting integrated circuit designs (without the treaty's compulsory licensing provision) into its patent law. Fourth, TRIPs requires protection of data bases, a topic which Malaysian law does not address. Fifth, TRIPs requires protection for geographic appellations and mandates specific rules for geographic appellations pertaining to wines and spirits. Finally, Malaysia, like all other countries, must modify its laws to embody GATT's enforcement procedures.

Summary

Since 1989 Malaysia has upgraded virtually all of its IP laws to respond to international pressure and to the demands of its own changing economy. The substantive provisions of Malaysia's IP laws now approximate those found in the OECD countries. The IPR enforcement mechanism has also been considerably strengthened in recent years and works better in Malaysia than in all of the other ASEAN countries with the possible exception of Singapore.
In sum, Malaysia has successfully designed and implemented a working, modern IPR system in just a few years. While some illegal copying persists, the problem is likely to fade with continued economic growth. Many foreign corporations now cite the Malaysian IPR system as a model for other countries.

THAILAND
IPR Legislation

Thai patent law is based on the model law proposed by the World Intellectual Property Organization (WIPO) of the United Nations. The Patent Act of 1991 (a revision of the 1979 Act) protects inventions and product designs. An invention must be novel, include an inventive step, and have industrial application, while a product design must fulfill only two requirements: novelty and industrial application. The term of a patent for an invention is 20 years from the date of application, while a product design has a term of ten years from the date of application. Patents can be freely licensed between residents of Thailand, and the license must be made in writing and registered with the Commerce Department. Patent licenses to nonresidents must be approved by the Bank of Thailand. Patents can be freely assigned as long as the assignment is made in writing.

Foreign patents are not recognized unless the patent holder also holds a patent in Thailand. A foreigner can obtain a parallel Thai patent only if the Thai patent application is filed before the foreign patent is granted and is filed no earlier than 12 months before the foreign patent is granted. If information about a product design has been made public in writing, the product design is ineligible for a Thai patent.

Some inventions, including plant and animal varieties, microbes, scientific and mathematical rules and theories, and computer programs cannot be patented. The 1991 Act removed a prohibition on pharmaceutical product patents, allowing them to be patented from October 1, 1992. Like other product patents, pharmaceutical product patents receive 20 years of protection from the date of application. However, since there is a long time lag between patenting a pharmaceutical product and bringing it to market, many pharmaceuticals that were granted product patents in the United States or the European Community in, for example, 1987, are just coming to market in Thailand in 1995. While Thailand’s patent law does not provide "pipeline" protection for these products, administrative procedures adopted by the Thai Food and Drug Administration allow no competition during the two-year, safety-testing period. Moreover, after a report examining the market situation, the Thailand Food and Drug Administration can award two one-year rollovers, for a total of four years of protection. These regulations apply only to drugs sold in hospitals or licensed clinics. The administrative restrictions apply to foreign patents issued after January 1, 1986. The pipeline problem will gradually fade away over the next few years, as almost all drugs brought to the Thai market after the year 2000 will be protected by product patents issued under the 1991 law and will have exclusive rights for 20 years.

Thailand is the only ASEAN country which links pharmaceutical patent protection to product pricing. If the Pharmaceutical Patents Review Board finds that pharmaceutical firms are charging excessive prices in the Thai market, it may award licenses to Thai firms to produce the product.

Although trade secrets are not protected by any specific Thai law, they can be protected by contracts between employers and employees or between a firm licensing the use of the process and the licensee. Damages can be recovered by the licensor if the licensee breaches the contract. Trade secrets can also be transferred under the general law of contract.

Copyrights are respected under the Copyright Act of 1978, which provides protection to literary,
Box 4.5: Thailand’s New Copyright Bill

The bill makes major changes in the Copyright Act in the following areas:

- It extends explicit protection to computer software and increases civil and criminal penalties for copying. Criminal penalties for illegal copying include increased fines (B20,000 to B800,000) and longer prison terms (four months to six years).

- Copyright owners are granted the right to petition the court to grant an injunction.

- Performers’ rights which are not protected in the current Copyright Act are incorporated in the pending bill. This prevents the recording and copying of live performances in Thailand, as allegedly occurred with recent concerts by the rock group, Guns and Roses, and Michael Jackson.

- The bill eliminates the current Act’s provision allowing publishers to translate foreign books into Thai without paying royalties ten years after publication in the foreign country. Instead, it allows translation after three-and-one-half years, with payment of royalties.¹

- Copyright protection is extended to the rental of movies and software. However, restaurants and hotels are allowed to play copyrighted music without seeking prior permission.²

¹Since September 1993, Thai publishers have been allowed to publish a translation three years after publication in the host country. However, royalties must be paid.
²“Alerts and Updates,” IP Asia, 30 June 1994, p. 27.

dramatic, artistic, musical, audio-visual, cinematographic, and broadcasting works. As computer programs are not specifically mentioned in the Act, there has been some controversy over whether they are covered. Copyright adheres to the author of the creative work, and registration is not required to obtain copyright. Reproduction for personal use, education, research, or teaching does not constitute infringement. The copyright generally is for the life of the author plus 50 years for an individual or 50 years for a corporation and can be freely transferred, licensed, or assigned. If the license is not made in writing, it is not presumed to be exclusive. Copyright transfers can be freely made, but must be in writing to be respected by a court. Because Thailand has joined the Berne Convention, foreign copyrights are respected as long as the foreign copyright originates in another country that has also signed the Berne Convention. A new copyright bill which makes major changes in the Copyright Act was passed by the Thai Legislature on November 10, 1994 (see Box 4.5: Thailand’s New Copyright Bill).

Trademarks receive legal protection under the Trade Mark Act of 1931 (as amended in 1961 and 1992). Most trademarks are registered in Thai and Roman script to facilitate infringement proceedings. The 1991 amendments also protect service, collective, and certification marks. Registration of a trademark is not required for protection to adhere to the mark, but registration does facilitate enforcement. In addition, registration provides for ten years of protection.
and can be renewed. Under the Act, a trademark must be sufficiently distinctive to identify the goods in question as originating from the firm using the trademark. Trademark licenses must be in writing and registered with the Registrar of Trademarks. The Registrar will not approve the agreement if it appears the licensee will be unable to produce goods of the requisite quality. Since the 1991 amendments, cancellation of a trademark is permitted after two years of nonuse rather than five years.

Foreign trademark holders can apply for a trademark in Thailand. As long as an application is filed in Thailand within six months of the date of application in the foreign country, the application will be treated in Thailand as if it were filed on the same date as in the foreign country. However, this condition only applies if Thai nationals receive the same treatment in the foreign country. The 1991 amendments allow for protection of internationally well-known marks even if they have not registered their marks in Thailand. Applications for marks which could confuse the general public will be rejected. A potentially restrictive requirement is that trademark registration applies only to specific goods (e.g., hotels) rather than to whole classes of goods (e.g., the travel industry). This could lead to potential problems for large multinational firms that offer a broad array of goods under a single trademark.

**Enforcement**

Patent infringement actions can be brought if the patented process or product is imported, used, sold, or applied by an unauthorized party unless the product or process is utilized for the benefit of education, research, experimentation, or analysis. Criminal actions can be brought against individuals who infringe on another's patent. The patent holder can ask the court to confiscate the products produced by unauthorized users of the patent and can also bring a civil suit for damages. The remedy for breach of a contract protecting trade secrets is the same as that for patents.

Copyright infringement is subject to both criminal and civil penalties. Criminal penalties include a fine of up to Baht 200,000 (one-half of which is awarded to the plaintiff) and up to one year in prison. Civil penalties allow the plaintiff in a civil suit to recover compensation for lost profits. Copies of the work made by the infringer become the property of the copyright holder.

While enforcement of trademarks is the responsibility of the trademark holder, complaints to the police can result in criminal prosecution. Criminal penalties (Sections 108 and 109) include a fine of up to Baht 400,000 and four years of prison. The 1992 amendments to the trademark law allow additional penalties for registered trademarks. Forgery is punishable with a fine of up to Baht 400,000 and four years in prison. Imitation of a trademark is punishable with a fine of up to Baht 200,000 and two years in prison. The same penalties exist for importing goods with forged or imitated trademarks. There is also criminal liability for corporation executives and directors who have knowledge of their firm's piracy activities. The Penal Code offers lower fines and prison terms with respect to forged or imitated foreign trademarks that are not registered in Thailand.

**Current Issues**

Thailand has made significant progress in its protection of intellectual property rights including improvements in its patent regulations and copyright enforcement, as well as pending legislation on copyright protection. For example, in April 1991, the USTR designated Thailand as a Priority Foreign Country under the Special 301 provision of the 1988 Trade Act; three years later, it was announced that Thailand's status had improved with the enactment of patent legislation in 1992 and the country was being moved to the Priority Watch List. More recently, in July 1994, the USTR ordered a review to determine whether Generalized System of Preferences (GSP) benefits to Thailand, that had been revoked in 1989 after a dispute over the manufacture
and sale of copyrighted products, should be restored. The USTR indicated that the review was being conducted due to improvements in patent regulations in 1992, "a significant improvement" in copyright enforcement since early 1993, and the passage of a new copyright bill by Thailand's legislature. In November 1994, USTR and State Department officials stated that they expected Thailand would be removed from the Priority Watch list and some GSP benefits would be restored.

Significant problems with Thailand's enforcement of IPR laws still remain. Although enforcement activities have been expanded in Bangkok and other provinces, "copyright piracy of audio and video tapes, computer software, and printed material remains extensive." For example computer software violations remain a major problem, with an estimated 99-percent piracy rate. Government raids against retail stores appear to be ineffective with the stores reopening soon after the raids and continuing to sell copied software; and penalties for repeat violations appear to be lower than for the first violation. While Microsoft representatives in Thailand believe that piracy is declining, it is still estimated that the piracy rate is approximately 90 percent for its Windows operating system. Nevertheless, as noted by the International Intellectual Property Alliance, 1993 saw "the first real progress" in stimulating the Thai government to take aggressive enforcement actions.

Progress appears to have been made in ending film piracy. The distribution company which handles exclusive distribution for the seven major U.S. motion picture distributors believes that Thai authorities have taken effective action on complaints it has lodged with the government. Three major court cases against individuals copying videocassettes for resale were decided in 1993 with penalties involving suspended prison sentences and fines ranging from US$1.25 to US$10 per illegal cassette. With the expanded enforcement, piracy of films shown in first-run motion picture theaters has fallen in Thailand, and poor-quality, bootleg copies have been seen less often in first-run theaters since 1993. With respect to trademarks, police resources devoted to enforcement have increased, but violations continue to persist and the enforcement process remains time-consuming and expensive.

In addition, pharmaceutical pipeline protection is still perceived as a problem by foreign pharmaceutical companies. Foreign pharmaceutical firms (most of which import pharmaceuticals to Thailand) are not pleased with the current law, as it only provides product patent protection to the most recently developed pharmaceuticals. Pharmaceuticals developed and patented during the 1980s and which are just now coming to market in Thailand receive a maximum of four years of administrative protection in one segment of the market (hospitals and licensed clinics). The rollover process, which extends administrative protection from two to four years, is still untried. Thus between 1994 and 2002, pharmaceutical firms will be launching many new pharmaceutical products which will receive only 2-4 years of protection. Following discussions between the USTR and the Thai government in March/April 1994, the Thai government has promised to introduce legislation that revises the patent law to conform with the 1994 GATT Treaty's provisions on pipeline products.

**TRIPs Harmonization**

Thailand will have to make fewer changes to its IPR laws than most other ASEAN countries to meet the minimum requirements mandated by TRIPs. First, TRIPs mandates that countries incorporate the Washington Treaty's protection for integrated circuits into their laws, and Thailand has not ratified the Washington Treaty. Second, TRIPs mandates that each country establish a system for protecting plant varieties, while Thai patent law currently prohibits the patenting of plant varieties. Third, Thailand allows 25 years of copyright protection for handicraft work, while TRIPs mandates at least 50 years of protection for all copyrights. Fourth, TRIPs requires
protection for geographic appellations and mandates specific rules for geographic appellations pertaining to wines and spirits. Finally, the new amendments to the Copyright Act should satisfy the TRIPs requirements pertaining to copyright law.

To accomplish some of these changes, the Thai Intellectual Property Department has contracted Chulalongkorn University to develop new Thai IPR laws consistent with international standards. They include laws protecting the design of integrated circuits, use of geographic names, origin of products, and trade secrets.

Summary
Thailand remains the most controversial ASEAN nation with respect to IPR policies. The new copyright, patent, and trademark laws have resolved most of the complaints with respect to statutory law. Amendment of IP laws to conform with the GATT should correct any remaining problems. Open sales of illegally copied goods or goods displaying an illegal trademark continue at high volumes but are declining. Foreign complaints over government enforcement activities continue, with the low penalties handed out to violators by Thai courts being singled out for criticism. To address this problem the Thai Cabinet is currently reviewing a draft of a bill to create a specialized Intellectual Property and International Trade Court. Similar specialized IP courts have been effective in increasing enforcement in other countries, such as the United States, and could be effective in Thailand. Until courts impose penalties for violating IPR laws which are sufficient to deter most violators, the "culture" of illegal copying and trademark violation is unlikely to be disrupted by new IP statutes.

THE PHILIPPINES

IPR Legislation
In June 1994, the Philippines revised its patent law. Under the law, a patent is granted to an invention, a design, or a utility model that is considered new and useful, but the invention, design, or utility model must not have been previously used or known in the Philippines for more than one year prior to the patent application. Inventions which cannot be patented include plant and animal varieties, methods for the treatment of the human or animal body by surgery or therapy, and diagnostic methods. The new law grants to the awardee exclusive rights to use and make the patented product or process for 17 years. Foreign patent holders must file for a patent within one year of being awarded their foreign patent or protection will not be granted. The Philippines is a party to the Paris Agreement.56

Domestic patent holders can freely contract with Philippine residents to license a patent, but foreign patent holders must have licensing contracts approved by the government's Technology Transfer Board. Certain types of patents, in particular patents for medicines, are subject to compulsory licensing agreements if the patent holder does not produce and market the product in the Philippines for two years after the patent's award. The patent law does not consider importation of the patented product as working the product. Under a 1993 agreement with the USTR, the Philippine Government has agreed to amend the patent law to conform with the 1991 draft TRIPs agreement which contains stronger provisions than the TRIPs agreement included in the Uruguay Round Treaty.

Trade secrets in the Philippines receive some protection under the penal code and can be protected by contract with employees and other agents under contract to the firm. Employees who disclose confidential information or who engage in competing businesses commit a breach of trust and may be dismissed. Employees may also be charged under the penal code (Articles 291 and 292) which criminalizes trade secret appropriation. Firms which induce employees to disclose confidential information may be liable for damages.
Copyrights are granted under the "Decree on the Protection of Intellectual Property" (Presidential Decree No. 49 as amended). Exclusive rights are granted to print, reproduce, sell, perform, and exhibit copyrighted works, including original literary, dramatic, historical, artistic and musical works, computer programs, and films. Copyrights are granted for 50 years beyond the life of the author. Performers, producers of sound recordings, and broadcasting companies receive 20 years of protection. Some works, such as sound recordings, must be registered and deposited with the National Library before the copyright owner is eligible to recover damages in an infringement action. Computer programs are protected by the Copyright Decree, but neither the term nor the extent of protection are specified. In addition, cable and satellite transmissions are not explicitly considered.

The Copyright Decree allows compulsory licenses to be granted to reprint any textbooks or reference books considered to be "exorbitantly" priced which usually translates into any price over P250 (about US$10). A royalty equal to 3 percent of the original foreign list price must be paid every six months. This provision is incompatible with the Berne Agreement and must be repealed when the Philippines accedes to Berne in December 1994.

Design patents can also be obtained for any new, useful, original, and ornamental design of a product. Model patents can be obtained for a new model, implement, or tool or an industrial product which is new, but does not meet the criteria to be an invention. Both types of patents have a term of five years and are renewable for two additional terms, thus yielding an effective life of 15 years.

Enforcement

IPR enforcement activities are coordinated by the Inter-Agency Committee on Intellectual Property Rights, established in February 1993. Complaints received by the Committee are referred to the Department of Trade and Industry (DTI) or the Department of Justice (DOJ). Enforcement activities are undertaken by the DTI's Office of Legal Affairs and its Bureau of Patents, Trademarks and Technology Transfer (BPTTT); the DOJ and its Task Force on Anti-Piracy and Counterfeiting; the Department of Finance's Bureau of Customs; and the Presidential Anti-Crime Commission. The DTI has primary responsibility for enforcing copyright laws. Cases are first referred to mediation; if no settlement is reached, the case is then referred to the DTI Office of Legal Affairs which has the authority to initiate investigations and issue administrative penalties independent of subsequent criminal or civil actions to be filed in regular courts. Moreover the DTI office can impose fines of up to P150,000; issue cease and desist orders; seize products; withhold permits, licenses, and registrations to parties in violation; and assess damages. The BPTTT hears and decides formal complaints related to trademark and patent applications and registrations. The DOJ Special Task Force on Anti-Piracy and Counterfeiting investigates and prosecutes infringement cases. The Videogram Regulatory Board has the authority to close retail establishments found to be illegally reproducing, selling, or distributing copied videocassettes. Between January 1992 and July 1993, there were 247
reported trademark complaints, 74 copyright complaints, and 17 patent complaints. Few civil cases are filed, probably due to the relatively low penalties that are handed out to violators by the courts.

The penalties for violating IP laws are relatively low in the Philippines compared to other ASEAN countries. Violation of the trademark law is subject to fines of P500 to P2000 and/or 6–34 months in jail. Patent violations bring fines of up to P10,000 and/or imprisonment of up to five years. Copyright violations specify fines of P200 to P2,000 or up to one year in prison. Violations of copyrights for recordings, motion pictures, and audiovisual works are subject to higher penalties of P50,000 to P100,000 and 3–15 months imprisonment.

Foreign intellectual property owners often complain of onerous requirements for bringing a case due to complex costly legal procedures, problems in finding a judge to issue a search warrant due to congestion in the Philippine court system, the high cost of identifying violators, and the difficulty of proving the actual sale of a counterfeit item. Obtaining an injunction to cease the infringing activity during the adjudication is particularly burdensome. Thus, most of the difficulties stem from the complexity and inefficiency of the overall judicial system rather than from discriminatory treatment against foreigners in the courts. As a result, private enforcement is limited by low penalties and by a judicial system rife with long and costly delays.

Government enforcement is also limited by the low budget and staffing of IP enforcement and registration agencies. For example, the Copyright Office has only four full-time personnel and is responsible for registering 20,000 works per year. Recordkeeping is not computerized, and the staff has little time or means to participate in copyright enforcement activities.

**Current Issues**

In April 1993, the United States and the Philippines concluded a comprehensive agreement to strengthen IPR protection. As a result, the Philippines was moved from the USTR's Priority Watch List to its Watch List. The agreement commits the Philippines to joining the Paris and Berne Conventions; extending the term of protection for sound recordings to 50 years; providing protection for internationally "well-known" trademarks; establishing rental rights for sound recordings and computer software; training customs officials to detect counterfeit and infringing goods; increasing fines for infringing activities; and adhering to the 1991 draft of the GATT TRIPS Agreement. The United States–Philippines agreement specifies that legislation effecting these changes will be enacted by December 1994.

In April 1994, the USTR announced that the Philippines was being retained on its Watch List as it continues to be concerned about a number of issues including the patent law requirement that a compulsory license be issued if domestic demand is not being met to an adequate extent and on reasonable terms; "widespread" trademark counterfeiting on denim jeans, designer shirts, and personal beauty and health care products; piracy of software and video; a short term of protection for sound recordings (30 rather than 50 years); the rental of video laser discs without the payment of fees to copyright owners; and the retransmission of copyrighted works by cable TV stations before their first-run exhibition in movie theatres.

In general, most foreign intellectual property holders are looking ahead to December 1994, when the U.S.–Philippines agreement is due to be implemented, and January 1995, when the GATT Agreement is due to be implemented. Raising IP statutes in the Philippines to international standards will set
the stage for concentrating on particular enforcement activities.

TRIPs Harmonization

The Philippines must make extensive changes to its IPR laws to conform with the TRIPs Agreement, although under the developing-country clause, the Philippines will have until 1999 to make most of these changes. However, its 1993 Agreement with the United States specifies that even stronger changes must be instituted by December 1994. Below we list changes mandated by the 1994 Uruguay Round Treaty.

First, the Philippines is not a party to the Washington or Rome Treaty, and TRIPs mandates that signatory countries modify their IPR laws to incorporate specified provisions from these treaties. Second, TRIPs requires that sound recordings be protected for 50 years while Philippine law specifies 20 years. Third, TRIPs requires protection of data bases, a topic which Philippine law does not address. Fourth, rental rights for copyrighted works must be established. Fifth, TRIPs requires that some type of protection for plant varieties be established, and Philippine patent law currently prohibits the patenting of new plant varieties. Sixth, TRIPs requires protection for geographic appellations and mandates specific rules for geographic appellations pertaining to wines and spirits. Seventh, TRIPs requires protection of trade secrets. While Philippine law allows for such protection by contract, damages have never been awarded in any trade secret case; thus one could reasonably argue that current trade secret law does not provide adequate protection under TRIPs. Finally, the Philippines, like all other countries, must modify its laws to embody GATT's enforcement procedures.

Summary

The 1993 IPR agreement with the United States and the 1994 TRIPs agreement mandate a complete overhaul of Philippine IPR law. If the Philippine Legislature amends its IP laws accordingly, then virtually all international objections to Philippine IP statutes will evaporate. This will, however, shift the international focus from the specification of IP rights to the enforcement of IP rights. As in Indonesia, it may take some time for enforcement activities and public attitudes to catch up with the rapid changes in IP statutes, and as in Thailand, opposition to stronger IP rights and enforcement activities is strong and will continue to affect the government's willingness to commit additional resources to enforcement activity.

CURRENT ISSUES IN UNITED STATES IPR LAW

While the United States has pressured the ASEAN countries to strengthen their statutory protection of IPRs and increase the amount of resources devoted to enforcing these rights, complaints have also been lodged against U.S. IPR laws. In 1994 the United States Congress resolved one area of international disagreement by passing legislation to open patent applications to public examination after 18 months. Previously, patent applications were kept confidential until they were approved. There are, however, still several significant areas of controversy with respect to U.S. IPRs.

First, since the Philippines amended its patent law in June 1994, the United States is the only one of the seven countries covered in this report to retain a "first-to-invent" rule for assigning priority to competing patent claims rather than a "first-to-file" rule. While most voices in academia and law practice recommend that the United States switch to the international rule, opposition from small inventors has halted consideration of this change in the U.S. Congress. Nonetheless, given that the United States has pressured the ASEAN countries and Mexico to harmonize their laws with the standards of developed countries, the United States should clearly take its own advice and adopt a first-to-file patent priority rule. In addition, Section 104 of the U.S. patent law only recognizes foreign claims dating back to the
date of the foreign patent application rather than the date of invention in the foreign country. This provision clearly violates the national treatment rules of the Paris Convention and the GATT.

Second, U.S. patent law specifies a 17-year term for a patent or plant patent and a 14-year term for a design patent. In 1984 the United States passed legislation to extend the term of process and product patents for certain regulated drugs and medical products. Since the TRIPs agreement mandates a 20-year term of protection from the time of patent application, the term for a patent may have to be amended.

Third, rights in computer programs can be secured by U.S. copyright law, a practice consistent with the prevailing international standard. However, some computer programs used by industry are protected by patents in the United States. Many other countries do not recognize patents on computer programs, and the differential protection could be the source of new IPR controversies between foreign countries and the United States.

Fourth, Section 337 of the Tariff Act of 1930 excludes imports which violate U.S. IP laws. While such exclusion is reasonable, the Act allows enforcement activities which reduce the cost of excluding foreign products that violate U.S. IP law relative to the cost of excluding domestic products that violate U.S. IP law. For example, complainants under Section 337 can choose between two forums (the International Trade Commission or federal court) to file a complaint, while complainants against products of U.S. origin have no choice of forum (federal court); respondents in Section 337 proceedings cannot raise counterclaims, while domestic respondents can raise counterclaims; exclusion orders in Section 337 proceedings are enforced automatically by the U.S. Customs Service, while successful plaintiffs in federal court must petition the court to begin enforcement proceedings. Such differential treatment violates the national treatment principles of the Paris Convention and the GATT.

Fifth, U.S. federal courts have interpreted the priority date provisions (Article 4) of the Paris Convention in a particularly narrow manner. Applications which are initially filed in a foreign country do not retain the foreign filing date as a priority date in the United States. The United States insists, however, on the application of the priority date principle to applications first filed in the United States. Thus, the system differentiates between patent application first filed in the United States and patent applications first filed outside of the United States. This violates the national treatment principles of the Paris Convention.

Finally, the United States has no registration system of design protection. It has been observed that "the [United States'] design patent system, ostensibly intended to promote the ornamental design of useful articles, has failed to effectuate its purpose because of the strict requirement that designs must be unobvious to be patentable." In this case, an overly strict standard for protection has eliminated protection for all but the most novel designs. While such a standard may or may not be "optimal," it contrasts with stronger statutory protection provided for less innovative designs in the United Kingdom, Australia, New Zealand, and some ASEAN countries.

MEXICO

Mexico's copyright law has long been consistent with international standards and has generally been well enforced. However, in 1976 Mexico enacted a Law on Patents and Trademarks which encouraged imitation and use of foreign technologies in Mexico's industries. Following a perception by the Mexican government that the law had reduced technology transfer, Mexico amended its patent laws in December 1986 to make process patent protection available on a wide scale and to extend product patents to
chemical and pharmaceutical products after a ten-year phase-in period. This change in the patent law was followed by a widespread public education campaign designed to change public attitudes toward intellectual property.

Mexico enacted further major reforms of its intellectual property laws in 1991, although implementing regulations for patents and trademarks have not been issued. The 1993 NAFTA agreement (between Canada, Mexico, and the United States) incorporates intellectual property rights provisions which the USTR praises as providing "the highest level of...IPR protection of any international agreement." The IPR provisions of NAFTA contain all provisions in the Uruguay Round TRIPs agreement, as well as additional features that were contained in the 1991 Draft TRIPs Agreement but were deleted in the final treaty. These features include an article (1715) specifying procedural and remedial aspects of civil and administrative procedures pertaining to IPR enforcement; an article (1714) specifying that enforcement procedures "are fair and equitable, are not unnecessarily complicated or costly, and do not entail unreasonable time-limits or unwarranted delays"; an article (1717) mandating provision of "criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale"; an article detailing criteria for enforcement of intellectual property rights at the border; and three annexes pertaining to Mexican IPR law and one annex pertaining to U.S. IPR law. Annex 1701.3 provides Mexico with two years to "comply with the substantive provisions of the 1978 or 1991 UPOV Convention"; Annex 1710.9 provides Mexico with four years to comply with the agreement's provisions on layout designs of semiconductor integrated circuits; Annex 1718.14 provides Mexico with three years to comply with the provisions for enforcement of intellectual property rights at the border; and Annex 1705.7 requires the United States to "provide protection to motion pictures produced in another Party's territory that have been declared in the public domain pursuant to 17 U.S.C. section 405."

Mexico already provides pipeline protection for pharmaceuticals patentees of any nationality and without any time limits, thereby providing protection for all uncommercialized pharmaceutical products. Patents are recognized for 20 years from the date of application, and extensions for three years are possible for patents licensed to Mexican pharmaceutical companies.

While the NAFTA accord removes all conflict between the United States and Mexico concerning Mexico's IPR statutes, the USTR has identified "significant enforcement problems." U.S. recording firms have estimated that two-thirds of all audio tapes sold in Mexico are pirated. In addition, enforcement against piracy of computer software, satellite signals, and textbook has not been "sustained." The USTR notes, however, that Mexico has recently formed an intra-agency task force to improve enforcement, and has started a campaign to educate the public with regard to the importance of IPR laws and their enforcement.

CONCLUSION

The ASEAN countries are currently making significant progress towards establishing and enforcing modern IPR systems, partly as a result of strong U.S. and European pressure which has forced many countries to accelerate the pace of change over the past ten years. In Malaysia and Singapore, IP statutes currently approximate OECD standards. If Thailand enacts pending copyright legislation, its IP statutes will also approximate OECD standards. Indonesia and the Philippines, however, still have serious deficiencies in their IPR laws, but are moving quickly to rectify them. Modification of the ASEAN countries' IP laws to adhere to TRIPs and, in the case of the Philippines, to the United States—Philippines IP Agreement, should correct most outstanding
problems with IP statutes over the next few years. In sum, throughout Southeast Asia, IP laws either currently approximate OECD standards or will approach them in just a few years.

Nevertheless, several major IPR issues remain and the ASEAN countries face major challenges ahead. Outlined below are several significant issues to be dealt with in the near future.

- **Enforcement of Computer Software Copyrights**

  Copying of computer software is likely to remain a significant problem in ASEAN despite increased enforcement efforts. Currently, enforcement efforts are concentrated on preventing the sale of illegally copied software at retail outlets and the use of such software in government and corporate offices. Malaysia's IPR enforcement unit has adopted a stringent policy of seizing computers in corporations and government offices when authentic software disks and manuals cannot be produced. One could argue that this policy is stronger than existing enforcement policies in the United States. Nonetheless, the political influence of the software producers lobby in the United States is growing, and the U.S. government is likely to continue pressuring foreign governments concerning enforcement of IPRs in computer software.

  Several ASEAN countries have, however, the potential for significant growth in their own domestic software industries. As growth in the ASEAN countries continues over the next decade and as ASEAN wages increase, substitution of computer systems for labor will become increasingly common. As the installed hardware base grows, the demand for programs using the domestic language and customs will increase rapidly. However, a domestic software industry may not arise if IPRs in software are not enforced. Thus, if ASEAN governments recognize the significant potential for growth in this industry, increased enforcement of IPRs is likely to be observed independent of continuing pressure from the United States.

- **Pharmaceutical Patents**

  Although the foreign pharmaceutical industry remains concerned about the lack of protection for pipeline pharmaceutical products in Thailand and Indonesia, within 3–5 years the issue will be resolved as new drugs reaching the market will have patents that were issued under current patent laws protecting pharmaceutical products. As a result of a declining need for pipeline protection, foreign pharmaceutical firms' concerns over pharmaceutical price controls are likely to reappear. Price controls are, however, not unique to ASEAN countries. For example, Japan has utilized a system of pharmaceutical price controls since the early 1950s, and the Clinton Administration has considered restrictions on pharmaceutical pricing in the U.S. market.

  Pharmaceutical patents are likely to remain a controversial topic over the next decade. It is unlikely that domestic pharmaceutical firms in the ASEAN countries will be developing new pharmaceutical products over the next 5–10 years. Increased patent protection for pharmaceutical products will produce higher pharmaceutical prices and a flow of royalty payments to foreign licensors. Thus, high pharmaceutical prices will surely continue to be a staple of populist political campaigns in ASEAN countries and will remain as a continuing source of international controversy.

- **Protection of Plant Varieties**

  Although protection of plant species and plant varieties has been stressed by developing countries in the negotiations over the biodiversity treaty, many ASEAN countries currently prohibit the protection of plant varieties. These policies are, however, extremely short-sighted,
as agriculture still constitutes a large part of the economy in all ASEAN countries except Singapore. New plant varieties now constitute a major source of productivity advancements in agriculture. The ASEAN countries should be encouraging rather than retarding the development of new plant varieties, particularly those derived from plants which are unique to the region. Moreover, all ASEAN countries (including Singapore!) have tropical rain forests containing thousands of potentially valuable plant species.

Given the lack of attention which this issue has received in the region, a conference which brings together patent experts, agricultural researchers and practitioners, as well as ASEAN government officials could develop new directions in this area. A standardized system of protection across ASEAN countries could also facilitate trade in plant varieties within the region. With the enormous potential for export of new plant varieties, regional governments are encouraged to use the opportunity presented by the TRIPS agreement (which requires protection of plant varieties) to move quickly to reform their laws in this area.

• Intellectual Property Courts

The United States has recently brought pressure on some ASEAN countries, particularly Thailand, to adopt specialized intellectual property courts. In the 1970s, the United States established a Federal Court of Appeals dedicated to IPR cases, and most observers believe that the new Court has been instrumental in standardizing and strengthening IPR enforcement in the United States. A specialized IPR court may be equally useful in the ASEAN countries if (1) it serves to combine criminal and civil cases in one court (as it could in Thailand) and (2) the volume of cases is large enough to warrant such specialized resource use. It is interesting to note that a paradox is associated with the operation of a specialized court; it is only needed if there is a large volume of cases, but if it operates well, its case load will decline to levels at which the court may not be justified. Countries may, therefore, want to consider "sunset" provisions in laws establishing such courts.

• ASEAN Patent Office

The European Patent Office has worked well and could serve as a model for an ASEAN patent office. Although ASEAN copyright laws have significant differences, patent laws and trademark laws are very similar. As such, the formation of an ASEAN patent office would generate millions of dollars of savings for regional governments. A standardized ASEAN patent would help to facilitate trade in technology between firms in the member countries. It would also eliminate the necessity for firms in ASEAN to apply for patents in the other ASEAN countries.

Some important issues would have to be resolved, however. For example, where would the Patent Office be located? In what language would the patent applications be registered? How would patents be adjudicated? Would it be necessary to form an ASEAN patent court? Future research by ASEAN academics and government officials must be conducted to map out various options before serious discussion of such a proposal can begin.

With IP statutes in the ASEAN economies being upgraded to OECD standards, the focus of the United States and foreign corporations has turned to enforcement regimes. There appears to be widespread dissatisfaction with the high level of violations and the costs associated with private enforcement of IP law in ASEAN countries. Such enforcement will, however, also be costly and time-consuming for government prosecutors, and it is not readily apparent that government assumption of an
increased responsibility for law enforcement would be more efficient than private enforcement. Public attitudes toward the law and its enforcement are also important, and one cannot expect public attitudes toward IP to change overnight. However, given the strong current and expected income growth in the ASEAN economies, more domestic interest groups will soon be producing goods with "creative" content and will acquire an interest in stronger IPR protection. For foreign corporations, it is vital for vigilance to be combined with patience, as the forces of economic development point to better enforcement in the near future.

At the same time that the ASEAN nations continue their development of effective IPR systems, the United States can also work to bring American IP laws more in line with existing and internationally accepted principles and rules of the GATT and the four major IPR conventions. Harmonization of some U.S. laws in specific areas with international standards—for example, the first-to-file rule and national treatment of foreign patent applications—can be improved.

While these changes and policies may be difficult to implement in ASEAN and the United States, the potential gains to each of these countries from cooperation in IP law are enormous. Changes to IP laws and enforcement should be monitored closely by regional governments, and further discussion and collaboration encouraged.
NOTES


2. Brunei does not belong to any international IPR conventions. Nonetheless, it is a party to the 1994 GATT agreement and is required to adhere to the TRIPs agreement by February 1995.


4. The patent may protect the final product or may protect a process or input used to produce the final product.

5. Developments in technology will be biased toward two types of products: (1) those for which secrecy can be maintained at low cost, and (2) those which can be reverse-engineered only with a long time lag and which require a significant amount of time to set up functioning production lines. New products and processes that can be easily imitated are less likely to be developed, as inventors will be unable to recoup their initial development costs.

6. In some cases, firms may choose to maintain a new production process as a trade secret. An advantage of using trade secret law rather than patent law to protect new production processes is that information about the new process is completely protected rather than disclosed in the patent. Public knowledge concerning the particulars of the process may spur competition in the development of competing processes and reduce the useful lifespan of the process. Trade secrets have, however, some disadvantages. The firm is required to spend resources to protect the secrecy of the production process, and trade secrets do not protect a production process if another firm independently develops the same process. For a comprehensive discussion of the economics of trade secrets, see S. N. S. Cheung. 1982. Property Rights in Trade Secrets. *Economic Inquiry* 20(Jan.): 40-53. Cheung makes the important point that it is difficult to provide legal protection for trade secrets, as it is not known exactly what is being protected. He urges policymakers to concentrate on "refining of criteria for drafting and enforcing patent claims so that recourse to the trade secret option may be reduced" (p. 52).


8. Of course, the patent system protects the embodiment of the idea, while the copyright system protects only the expression of the idea. However, the patent system does not prevent an individual from using the new idea to develop another new idea.

may be produced at a higher cost than would be incurred by the patent holder. These additional costs should be considered in any normative discussion of optimal patent lives. See M. K. Berkowitz and Y. Kotowitz. 1982. Patent Policy in an Open Economy. Canadian Journal of Economics 15:1–17 for a discussion of optimal patent policy in a small open economy.


16. Singapore is a member of WIPO which requires membership in the Berne Convention. However, government officials in Singapore did not indicate that membership in Berne is being actively considered.


20. The GATT classifies all ASEAN countries except Singapore as developing countries.


25. The Indonesian authorities promise to evaluate the pharmaceutical application within one year with certificates of regulatory approval from three major countries.

26. Law No. 6 of the Republic of Indonesia (April 12, 1982) on Copyright.


31. Procedures include submitting a completed application, a six-month announcement period to solicit protests, an examination lasting up to nine months commencing after the announcement period, the registry of the mark on the General List of Trademarks, and the issuance of the trademark certificate.


36. For sound recording piracy, the maximum fine was S$2,000 or imprisonment of one year.

37. See Uphoff (1991:Ch. 2).

38. The United States had threatened to withdraw GSP privileges if Singapore did not amend its Copyright Act. However, after Singapore had amended its Copyright Act in January 1987, the United States nevertheless withdrew Singapore’s GSP privileges in January 1988.

40. See Section 53 for qualifications.


48. Although the Patents Act was amended in 1993, enforcement of the amendments will not occur until January 1995, at the earliest. Thus, the definitions of utility innovation and new inventions provided in the text are not yet in force.


51. GSP provides preferential tariff rates to certain categories of goods from developing countries. GSP benefits in Thailand would apply to approximately $US860 million of jewelry, ornaments made from precious stones and other materials, wooden furniture, mosaic ceramic tiles, and artificial flowers.


58. This section relies heavily on the report by the Philippine Exporters Confederation (1994).


64. USTR (1994:203).


CHAPTER FIVE

THE CHALLENGE OF THE ENVIRONMENT ISSUE TO ASEAN'S TRADE AND DEVELOPMENT

Manuel F. Montes*

INTRODUCTION

The adoption of Agenda 21 at the United Nations Conference on Environment and Development (UNCED) in 1992, which has been characterized as "the mother of all conferences," marks the emergence of the environment as a permanent international issue. Agenda 21 represents a culmination of earlier, more ad hoc, international environmental efforts—such as the United Nations Convention on International Trade in Endangered Species (CITES) of Wild Fauna and Flora and the Montreal Protocol on Substances that Deplete the Ozone (Montreal Protocol)—and the beginning of the intrusion or inclusion, depending on one's position on the importance of the environment, of environmental issues into other international questions. And indeed, Agenda 21 threatens, or promises, to have profound impacts on international trade. These impacts were already evident in 1993 when negotiations ended on the North American Free Trade Agreement (NAFTA) and the Uruguay Round of the GATT (General Agreement on Tariffs and Trade).

This paper reviews the relationship between trade and the environment as it relates to the ASEAN countries (Association of Southeast Asian Nations which presently include Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, and Thailand). In the next section, the main issues that connect trade to the environment, insofar as national policies are concerned, are discussed. Subsequently, the environmental policies of the ASEAN countries and the United States are reviewed and the environmental features of GATT and other related trade agreements of interest to ASEAN are examined. An entire section is devoted to the NAFTA environmental agreement. The final sections review ASEAN's efforts to cooperate on environmental issues and concludes with recommendations and future perspectives.

AN OVERVIEW OF THE ENVIRONMENT ISSUE

A discussion of the relationship between the environment and trade can range from questions of energy supply to that of global warming, from a consideration of economic inefficiency (arising from subsidies, price controls, and restraints to trade) to the role of social equity and distribution, and from disputes over national sovereignty to intergenerational responsibility. In this section, the discussion is restricted to the issues involved in the relationship between (1) free trade and (2) protection of the environment.

Both free trade and a healthy environment are desirable objectives, but when conflicts arise, advocates of each of these objectives typically take the view that their goal should take primacy over the other.² According to the free-trade advocates,
environmental policies tend to be trade barriers that prevent countries from pursuing their development based on their comparative advantage. For example, it has been argued that the Basel Convention on the Control of Hazardous Wastes hinders Asian development prospects because Asia has a comparative advantage in importing waste. Free-trade advocates suggest that policies promoting environmental protection need to subsumed under policies that advance free trade since (1) free trade enhances growth and growth enhances the demand for environmental goods; (2) the removal of trade-restraining tariffs and subsidies (for example, agricultural policies in the European Community that implicitly or explicitly affect fertilizer and pesticide use) rectifies both inefficient resource use and environmental damage; and (3) freer trade encourages the transfer of environmentally friendly production technology between countries.

On the other hand, the environmental position is that, based on historical patterns of trade and growth, freer trade tends to be a vehicle for the proliferation of environmental destruction. Expanded trade, even while enhancing natural resource exports of poorer countries, opens the door for accelerated world consumption of these resources, mostly by citizens of wealthy countries. More growth, in turn, implies increases in the production of natural resources to provide for human life. Thus, freer trade regimes often necessitate the lowering of health, safety, and workplace standards to the lowest common denominator, and, as opposed to a strategy of prevention, postponement of environmental cleanup increases the risk of permanent natural losses and greater expenses associated with undoing the damage.

From the point of view of national policy and international relations, the environment-trade nexus boils down to the appropriateness of trade measures in achieving environmental objectives. As yet, economic arguments that are against the use of trade measures to achieve environmental objectives, while admittedly based on first-best models, have not been decisive in the arena of domestic/international politics and, thus, have not prevented the proliferation of proposals that use trade measures to satisfy environmental goals. For example, some important international conventions directly affect trade to achieve environmental ends; among these are the Convention on International Trade in Endangered Species (CITES), the Montreal Protocol on the Ozone Layer (Montreal Protocol), the International Convention for the Regulation of Whaling, and the Basel Convention on the Movement of Transboundary Wastes.

The environment-trade nexus centers around two critical policy areas, both of which are concerned with market access: (1) international competitiveness and (2) the international application of domestic environmental standards which can, in turn, be broken down into (a) product and (b) process standards. With respect to the first policy area, it is clear that environmental regulations can affect international competitiveness to the extent that countries with less stringent environmental regulations compete with those with more stringent standards under more liberalized international trade regimes. In a world with unequal environmental standards, liberalization of capital flows creates the danger of the transfer of manufacturing/mining processes from countries with high standards to those, mostly developing countries, with lower standards (the "pollution haven" hypothesis). The effect of such environmental regulation–inspired capital flows is not only accelerating (and shifting) the destruction of natural resources planetwide, but there is also the standard trade impact of the loss of employment in the capital-exporting countries, something that would occur even without capital flows from the liberalized imports of goods to lower-cost, less environmentally-regulated producers. These problems create incentives for governments from countries with high environmental standards to pressure low-standard countries to raise the standards; based on efficiency arguments, however, the latter countries will resist
and producers in both countries tend to argue for the lowering of standards.

An important theoretical idea, adopted by the Organisation for Economic Co-operation and Development (OECD), that has arisen in this area is the "polluter pays principle" which states that the polluter should bear the cost of abatement or cleanup. Under this principle, such costs should not be paid for by government subsidies but rather the price of the product should internalize the environmental cost (i.e., depending upon market conditions, the consumer and the producer share in paying the social environmental cost). Environmental considerations have become unavoidable in countries' efforts to pursue national competitiveness under international trade liberalization programs, even if these will only mean that countries agree to strengthen their environmental regulations in concert or use the polluter pays principle in determining national policy.

Domestic product standards are ubiquitous in advanced industrial countries whose markets developing countries seek most to penetrate. Packaging requirements, pesticide residues, and emission standards are examples of domestic product standards. While these requirements can be interpreted as the response of each country, and each locality such as states in the United States, to specific environmental conditions and consumer preferences, they can also be interpreted as "covert trade barriers." The basis under which these requirements can be challenged under GATT is whether they discriminate between domestically produced and imported products. In a recent GATT case, for example, it was determined that a Canadian province which prohibited the sale of beer in more-expensive-to-recycle aluminum cans that happened to be produced across the border in the United States was GATT-illegal. Still another example, and what is perhaps a greater provocation to trade institutions, is the German packaging law which requires manufacturers to be prepared to take back the packages in which their products are sold. As yet, however, it is not clear to what extent the law will be implemented and subsequently challenged as being discriminatory to imports.

A clearly more controversial threat to existing trade regimes is the question of applying domestic production standards to goods imported from other countries. The most famous (or infamous, depending on one's viewpoint) case is the U.S. Marine Mammal Protection Act which adversely affected exports of Mexican tuna which were caught without protection for dolphins. A GATT panel ruled the law to be in violation of GATT principles because it constituted the application of a domestic standard to a geographical area where the United States had no jurisdiction. (This issue is discussed further in the GATT section to illustrate the GATT approach.) Thus far, the United States has ignored the ruling, but this action will be more difficult or costly when the Uruguay Round comes into force.

Proposals for "eco-labelling"—which signify that a product has been produced in some ecologically sustainable way—can be interpreted in many different ways: (1) as a halfway, perhaps more voluntary, means by which process standards can be transmitted across trading countries; or (2) as a way of intervening at the level of production, instead of in the sphere of trade, and avoiding the corresponding deadweight losses from trade intervention. With regards to the first interpretation, it is not clear whether eco-labelling, if implemented as a state policy, is or is not a discriminatory trade practice, especially if it leads to treating products that are essentially alike—except in the manner and the location in which they are produced—unequally, as in the case of beer packed in aluminum cans. With regards to the second interpretation, while inefficiencies from trade might be avoided (and thus this would be the last word one might hear from trade economists), it is not clear if the application of more environment-friendly production technologies in areas with greater environmental damage-bearing
capacity is not a prescription for inefficiency, especially from the point of view of the affected (usually underdeveloped) country, even if one were to accept that the new technology enhances the conservation of the earth's resources from a planetary perspective.

This leads us to the issue of the international setting of product and production standards. In order to prevent these standards from being accused of acting as protectionist measures, these standards are often said to be based on science. However, in many cases, such as the controversy surrounding the ban of hormone use in cows under the Codex Alimentarius, science has not yet reached an uncontroversial answer on the minimum standards. Even more intricate are the national, social, cultural, economic, and location-specific elements for standards-setting. The standards for sustainable wood production in developing countries, for example, must take into account the variety of forest uses and the sources of income for people in the area. It may also have to take into account the development ambitions of the nation in which the forest is located, a nation which would predispose it to accept degrees of natural asset destruction to finance current imports of capital goods. These standards then have to be recognized by importing (mostly industrial) countries as the basis for eco-labels.

Policies of the United States

U.S. environmental policies are best described as a quilt of overlapping, sometimes contradictory, regulations emanating from the individual states and a myriad of local and federal statutes that are meant for different departments in the city, state, and federal bureaucracies. State and local governments exercise direct control over natural resources and environmental issues. At the federal level, the ability of the government to intervene in environmental issues is defined by the elements in the U.S. constitution. The power of the Environmental Protection Agency (EPA), for example, derives from the power of the federal government to set the rules for interstate commerce. And within the federal bureaucracy, the same resources—for example, water and air—are managed by various departments and/or regulations. For example, while the EPA is the most well-known agency involved in environmental policy, other agencies such as the Department of Transportation and the Coast Guard, the Occupational Safety and Health Administration (OSHA), and the Nuclear Regulatory Commission are also involved. With respect to overlapping regulations on resources, the Safe Water Drinking Act regulates drinking, the Clean Water Act regulates wastewater, and hazardous waste discharges to the ground are regulated under the Resource Conservation and Recovery Act and the Comprehensive Environmental Response and Cleanup Act (the Superfund Law).

U.S. environmental policies typically regulate domestic production processes (mostly in regard to their effluents) and set product standards as well. For example, the Clean Air Act of 1990 mandated a 90 percent reduction in sulfur dioxide and more stringent auto emission standards, required control technology for 189 hazardous air pollutants, and launched a program for the phasing out of ozone-depleting chemicals.

From an international viewpoint, there are two notable elements of U.S. domestic environmental policy. The first is the community and worker right-to-know principle which requires organizations to disclose their hazardous materials and emergency plans for handling these materials; this is enshrined in the Superfund legislation, but actually traces its origin to the Bhopal disaster in India in which the unintended leakage of poisonous gas from a U.S. company's plant resulted in 2,300 deaths and countless injuries. The second is the requirement for an environmental impact assessment (EIA) every time the federal government undertakes a project;
many states in the United States have corresponding impact assessment requirements.

The United States is a signatory to all significant international environmental agreements; its hesitation to sign the protocols at the Rio meeting, however, gave cause for much comment. The United States upholds CITES, the Montreal Protocol, and the Whaling Convention. In addition, it has a set of environmentally-inspired trade measures of its own:

1. the (in)famous Marine Mammal Protection Act which controls the importation of tuna, baby seal skins, and other mammal parts

2. the Endangered Species Act which provides stricter enforcement of CITES

3. the Pelly Amendment which outlines enforcement of the Whaling Convention and other environmental treaties

4. the African Elephant Conservation Act which limits trade in elephant parts

5. the Magnuson Fisheries Conservation and Management Act which controls fish landings based on environmental grounds

6. the Federal Insecticide Fungicide and Rodenticide Act which requires foreign notification of use of certain chemicals

7. the Resource Conservation and Recovery Act which requires foreign notification of use of certain chemicals.

In 1993, the "Side Accord on the Environment" in the North American Free Trade Agreement (NAFTA) among Canada, Mexico, and the United States authorized the use of trade measures in retaliation for the non-implementation by contracting parties of their domestic environmental regulations. This side agreement provides for a wide-ranging set of commitments on the environment and, if the environmentalists had their way, would provide a model for what GATT could become.

The side agreement requires countries to periodically prepare public reports on the state of the environment and to develop environmental emergency preparedness plans, promote education on environmental matters, and assess environmental impacts. To oversee these goals, it created the Commission for Environmental Cooperation, with a standing secretariat and governed by a council composed of cabinet-level representatives. Because it provides a focus for business and nongovernmental organization lobbies, the Commission has the potential for becoming active in issues regarding the relationship between trade and the environment. This council can develop and recommend laws that the contracting parties can pass in their respective legislatures.

The environmental side agreement requires all parties to publish and enforce their environmental laws and regulations, and to notify each other in a timely manner about environmental measures. It provides for a dispute mechanism. Sanctions for non-implementation of environmental policies could take the form of monetary penalties and trade measures.

The created institutions and the country commitments under the side accord are unprecedented. One observer characterizes the environmental outcome of NAFTA as signifying that GATT is outdated and that an era in which trade "conditioned on social goals, especially on maintaining eco-system sustainability" has begun. This interpretation relies on a judgement that the environmental interests in the advanced countries will successfully put their agenda on the trade table, as they were able to do in the case of NAFTA.
POLICIES OF THE ASEAN COUNTRIES

The ASEAN countries, while being a party to all major international environmental conditions, are not party to any strong trade and environmental linkages as is the United States under NAFTA. Nevertheless, they have been active in upgrading their own environmental policies since the 1970s. Each of the member countries have progressively regulated the use of chemicals and the disposal of waste and pollution. Aside from emission standards, their other efforts have included the installation of systems of environmental impact assessments and the setting aside of nature reserves, paralleling the U.S. approach. These efforts affirm the individual countries' commitment to their protecting their natural resources. However, unlike the United States and except for Singapore, the member countries have decidedly weaker enforcement mechanisms for the environment. Thus, not only are the impacts of the regulations less pronounced, but these countries have more limited experience with regards to their impacts. These countries are also constrained by a weaker base of scientific research.

INDONESIA

As is the pattern in the other ASEAN countries, Indonesia's formal environmental management systems began quietly in the 1970s and accelerated in the 1980s. A series of regulations and presidential and ministerial decrees from the early 1980s provide the basis for Indonesia's current environmental policies. In 1982, Act No. 4 laid out the basic provisions for managing the environment; this was followed by Industrial Act No. 5 which set out the guidelines for industrial waste management and pollution control. In 1986, the government announced the first guidelines for environmental impact analysis (EIA) under Regulation No. 29 of June 1986; the implementation rules for EIAs were spelled out in 1987 under Ministerial Decree of the State Minister of Population and the Environment Nos. 49, 50, 51, 52, and 53. Efforts to set environmental quality standards began in 1988 with Ministerial Decree of State Minister of Population and Environment No. Kep-02/MenKLH/1/1988. Water pollution standards under these guidelines were elaborated in Government of the Republic of Indonesia Regulation No. 20 of June 1990, the Ministerial Decree of the Minister of Public Works No. 45/PRT/1990 of July 1990, and the Ministerial Decree of the State Minister of Population and the Environment No. Kep-03/MenKLH/II, 1991 in February 1991.

The State Minister for Population and the Environment (KLH) is involved in policy-setting and acts as the national coordinator for environmental issues rather than as a regulatory agency. The Environmental Impact Management Agency (Badedal) has direct responsibility for environmental pollution control, hazardous waste management, monitoring of different activities with regard to their environmental impacts, and environmental information.

Environmental Priorities

Indonesia has organized its environmental efforts into the following key areas: (1) surface water pollution, (2) mobile sources of air pollution, (3) sanitation and municipal waste control in urban areas, (4) coastal and sea water pollution control, (5) environmental impact assessment (AMDAL), (6) hazardous waste management, and (7) enforcement and compliance.

The control of water pollution in Indonesia's rivers, under a program called Prokasih, has received the highest priority throughout the country. The Prokasih project has completed an environmental inventory of critical rivers near urban areas and wood-processing centers, and has identified the important sources of river pollution. The first target of Prokasih is to reduce the pollution burden of reported discharges by 50 percent.

Indonesia's ambient air quality standards prescribe maximum exposure levels of sulfur dioxide
(SO\textsubscript{2}), carbon monoxide (CO\textsubscript{2}), nitrogen oxides (NO\textsubscript{X} and O\textsubscript{3}), dust, lead, hydrogen sulfide (H\textsubscript{2}S), and ammonia (NH\textsubscript{3}). Indonesia provides for three levels of emission quality standards: A for a high-quality standard, B for a medium-quality standard, and C for a low-quality standard. In the beginning, existing operations were required to conform to quality standard C. In general, new projects are expected to conform to quality standard A or B, depending on the industry and its place in the priorities of national development. The emission standards regulate sulfuric acid emission, nitrogen oxides, zinc, mercury, and other toxic substances plus smoke emissions.

In terms of water quality management, Indonesia provides for four levels of stream classifications, with the highest level being level A for drinking water sources. Indonesia has specific liquid waste standards for the caustic soda industry, the metal-plating industry, leather tanning, oil refineries, palm oil, rubber, sugar, tapioca, textile, urea fertilizer, ethanol, monosodium glutamate, plywood, and the pulp and paper industries. While the control of waste disposal by industries has met with some success, success in improving water quality is hampered, as in other ASEAN countries, by problems of controlling waste from households.\textsuperscript{13} As in other ASEAN countries, improved coordination between different ministries will improve activities to monitor and control waste emissions.

The new requirements for environmental impact assessments has created a demand for organizations and individuals with the capability to carry out and evaluate these studies. The priority accorded to river cleanup has forced existing companies to invest or consider investing in waste monitoring and control, and waste treatment equipment. It has also been suggested that certain government agencies such as those in the department of industry, health, and forestry, and the port authority will be faced with an increasing need for environmental equipment and technical assistance.\textsuperscript{14} Hospitals will also be in need of waste disposal equipment.

One key environmental management issue in Indonesia is the emergence of industrial estates. Many privately operated estates do not have provisions for waste treatment, thereby, effectively shifting to local authorities and government the burden of waste management. New industrial estates are now required to treat the waste generated by factories on their premises.

MALAYSIA

Malaysia's shift in attention to environmental problems occurred in the 1970s after years of rapid economic development based on robust natural resource-based exports (notably crude oil, rubber, and tin) and a decisive shift into manufacturing. Singh (1992) cites various environmental events, such as the discovery of biologically dead rivers (Sungai Juru and Sungai Kelang) and oil spills (the Showa Maru and Diego Silang), and increasing sensitivity to improper sewage and solid waste disposal as causes behind the emergence of public interest and intervention in environmental management.\textsuperscript{15} In 1974, the Environmental Quality Act, which established the Department of Environment within the Ministry of Science and Technology, was passed.

Environmental Priorities

Environmental objectives became part of the third Malaysian development plan of 1976–1980. At this stage, Malaysian planners recognized the need to incorporate environmental concerns in project planning and that prevention through conservation might be more effective than subsequent curative measures. The current (sixth) Malaysian Plan for 1991–1995 calls for a wide-ranging review of the environmental measures that have been put in place since the third plan. Among the key environmental measures are:
1. Environmental quality regulations on crude palm oil (Crude Palm Oil Order of 1977, amended in 1982)

2. Motor vehicle smoke and gas emission rules (December 1977) augmented by control of lead regulation on gasoline (July 1985) and noise pollution (July 1987)

3. Environmental quality regulations on natural rubber production (April 1979)

4. Clean air regulations (December 1978)

5. Regulation of sewage and industrial effluents (January 1979)

6. Requirements for environmental impact assessments based on the amendments to the Environmental Quality Act of 1985 and implementing rules issues in April 1988


Environmental impact assessments (EIA) in Malaysia were originally used to assist in the evaluation of development projects; in April 1988, EIAs became mandatory. Most of these assessments have been made with respect to proposals involving mining, infrastructure and recreational development, industry, and forestry.16

Malaysia's policies regarding air pollution are based on emission standards for business concerns and control of motor vehicle emissions. Seventy-four percent of total emissions come from motor vehicles; between 1987 and 1990, pollution from this source increased by 15 percent. Carbon monoxide is the major air pollutant, while cement and mining industries contribute heavily to particulate pollution. Malaysia has implemented a strong program to reduce pollution from stationary sources such as factories and power plants. Between 1987 and 1990, Malaysia reduced the pollution from power plants by 15.6 percent, and power stations now contribute only one-seventh that contributed by automobiles. Malaysia has completed the shift to lead-free fuel, but the strong growth in the number of vehicles will continue to raise the pollution contribution of mobile sources.

In the case of water regulation, Malaysia shifted its emphasis from agriculture to industry in monitoring and regulation due to the shift into manufacturing activities. The food and beverage industry accounts for 41 percent of the pollution, while palm oil mills and rubber-processing factories now account for only 21 percent of the pollution. Malaysia regulates the following sources of water pollution: (1) sewage, (2) rubber-processing factories, (3) palm oil mills, (4) animal husbandry, and (5) other industries. Domestic sewage and animal husbandry are the main contributors to organic load in water resources.

Malaysia classifies water quality according to the following categories: (1) water for domestic water supply, (2) water for aquatic life, (3) livestock drinking water, (4) recreational water, and (5) irrigation water. Detailed standard levels based on inorganic and organic material content have been legislated mostly for domestic water supply and aquatic life purposes. The Department of the Environment monitors the water quality of rivers and coastal areas.

Malaysia is interested in U.S. technology and technical advice in the design of regulations and standards.17 Among the technologies that Malaysians consider promising are process alteration, raw material substitution, and waste minimization in highly polluting industries. The United States also has specific experience in cleaning up PCB, asbestos, and underground storage tanks. Training programs in worker safety, recognizing the U.S. experience in occupational safety and health, and approaches to
privatizing sewage treatments which some U.S. local
governments have undertaken are also of interest.

THE PHILIPPINES

As in the United States which has a strong
private-sector tradition, the Philippines' main instru­
ment of environmental policy is the environmental
impact statement (EIS) approach. In 1977, President­
tial Decree No. 1151 (equivalent to a law, but enacted
under the martial law regime) established the Na­
tional Environmental Protection Council (NEPC) and
the country's overall environmental approach; this
decree pronounced the requirement for EIS. In 1977,
two presidential enactments, Letter of Instruction No.
422 and 549, created the Inter-agency Environmental
Protection Committee and installed the administra­
tive system to evaluate the environmental impacts of
government and private-sector projects. The NEPC
was reorganized in 1987 as the Environmental
Management Bureau within the Department of
Environment and Natural Resources. The Philippine
EIS system shares with the systems in other ASEAN
countries constraints with respect to the lack of
trained personnel, limited budgets, and variable
political commitment to environmental issues on the
part of national leaders.

Only 13 percent of metropolitan Manila's
households are served by sewerage systems, which
are nonexistent except for one other city located in
Mindanao; this means that only 2 percent of the
country's population are served by a sewerage
system. Septic tanks serve as sewage and disposal
systems; effluents are discharged into street canals
and storm drains and flow into river systems.
Wastewater is also discharged into open ditches. In
Manila, wastewater flows into Manila Bay through
four river basins, all of which are now considered to
be biologically dead. In a 1990 survey of 3,552
industrial plants, 552 were found to be significant
water polluters. Plants and factories located in Manila discharged
their untreated or partially treated wastewater into
the river systems. Textile mills, for example, operate
old wastewater treatment plants none of which
remove color from their waste.

Non-urban water systems have also become
polluted to the extent that they have inordinate
amounts of suspended solids. One source of the
pollution, in this instance, is farming in mountainous
areas on lands opened up by logging activities.
Another source is the rural industries, such as sugar
mills, which spew significant amounts of organic
waste into the environment. Heavily sedimented
rivers reduce the country's irrigation capacity for
agriculture. Pollution from rivers and land into
lakes and the ocean have destroyed coral and man­
groves. A 1988 survey estimated the total mangrove
area to be 139,725 hectares, down from an estimated
400,000 hectares in the 1920s. In addition, as much
as 70 percent of the country's coral reefs have been
destroyed or degraded. Coral reef production has
deprecated at least 37 percent between 1966 and 1986.
In a case study comparing mining/logging activities
to fishing/tourism in a bay in Palawan, an island in
the southern Philippines, Hodgson and Dixon (1988)
estimate the economic cost over ten years of sedi­
mentation from logging into Bacuit Bay in terms of
the damage that resulted in the tourism and fishing
industries to exceed $11 million.

As in other ASEAN countries, air pollution in
urbanized areas is increasing rapidly along with
motor vehicle use and the proliferation of small-scale
industries. Total suspended particulates in the
metropolitan Manila area increased by 20 percent
between the late 1970s and 1990. The most heavily
polluted area was one that had many small and
medium-scale factories.

The Philippines provides ambient standards
(which vary according to the industries located in the
area) and emission standards (which also depend on
the different types of stationary and mobile sources
in the area). As in other ASEAN countries, automobiles are the primary sources of carbon monoxide, nitrogen gases, organic gases, and particulate matter in the air. Among the stationary sources, cement, fertilizer, petroleum, pulp and paper, power plants, and iron and steel factories were the most significant contributors to air pollution. That Filipinos have become more aware of air pollution problems is clearly indicated by the incident whereby local residents blocked the operation of a coal-fired thermal power plant (the Calaca power station) near Manila.

The installation of sewerage and wastewater treatment facilities is an important agenda item for the Philippines' future, and is one for which U.S. assistance would be welcome. The demand for monitoring equipment, including portable ones, is expected to steadily increase as the environmental agenda becomes more decisive. Technology to dispose of waste and sludge (many industries maintain junk yards as storage sites) will be important as land becomes more valuable due to continued economic growth and population pressures. Opportunities in training and technical assistance in setting standards, evaluating environmental impacts, designing of programs to rehabilitate rivers will enjoy a steady increase.

SINGAPORE

Singapore enacted its first clean air act (directed at controlling open fires) in 1973, less than a decade after it launched its outward-oriented development push. Since that time, Singapore has steadily improved its environmental management. It has succeeded in reviving its main river, a legacy from previously unregulated times, and has been able to anticipate many of the potential environmental problems. Singapore's effluent standards date from 1976. In 1988, it raised its toxic industrial waste regulations under the environmental public health program.

What distinguishes the Singaporean experience is the high degree of compliance with required standards. Because of the strong state involvement in the approval process for private ventures, Singapore has been able to incorporate its environmental requirements into the design of new development and thereby control the location of new operations. The Pollution Control Department (PCD) under the Ministry of the Environment checks building plans and inspects the actual construction. When plants are in operation, the PCD carries out inspections to make sure that the pollution control equipments are operating and are being maintained. Thus, Singapore is an example in which strict environmental regulation, imposed on the private sector, does not necessarily prevent continued interest from foreign investors to locate locally.

Singapore has been phasing out its pig farms and encouraging owners to relocate to the Philippines, for example, to reduce waste into rivers and streams. It has encouraged development of old areas to reduce the number of backyard industries and closely monitors remaining backyard operations.

Singapore monitors ambient air quality based on World Health Organization (WHO) standards. It has reduced the lead content in petrol from 0.6 grams per liter in 1981 to 0.15 grams per liter by 1987, so lead concentrations have fallen dramatically. Singapore's controls extend to such detailed activities as sand blasting and spray painting.

Singapore's experience presents many insights for its neighbors, even though the superiority of its state bureaucracy will be hard to match in other countries. It has provided a tropical proving ground for environmental technologies originally developed in temperate countries. It is also beginning to shed off its smokestack factories. Singapore has been active in ASEAN environmental working groups.
THAILAND

As is the case in the other ASEAN countries, the responsibility for environmental management in Thailand is shared by many different government agencies. The National Environmental Board, created in 1975, is recognized as the premier environmental agency with the responsibility of monitoring, regulating, and mitigating environmental problems. Other key agencies are the Department of Industrial Works which issues licenses to factories and has direct regulatory power over industrial pollution, the police department which registers and inspects motor vehicles, the Department of Labor which concentrates on working conditions including ambient standards in the factories, the Department of Health which maintains air quality monitoring stations, the Bangkok Metropolitan Administration which has to address all of Bangkok's environmental problems, and provincial authorities who have responsibility over local environmental problems.

Urban Pollution

Because of the dominance of Bangkok and its central role in the economy, urban pollution is a key Thai environmental issue. The annual cost of congestion in Bangkok was estimated to have increased from $272 million in 1989 to $400 million in 1993, while the cost of air pollution alone was estimated at $380-580 million in 1989 and between $1.3-3.1 billion in 1993. On a national basis, transportation sources account for 60 percent of the carbon monoxide, 46 percent of the hydrocarbon, and 23 percent of nitrogen oxide emissions. Power generation contributes 82 percent of the sulfur dioxide pollution, 54 percent of particulates, and 44 percent of nitrogen oxide emissions.

Households are blamed for 42 percent of the particulate emission due to the poor combustion of traditional fuels. This has potentially significant health implications for those who are exposed to home cooking activities. More than 60 percent of total suspended particulate matter are of sizes smaller than 10 microns falling into the inhalable range.

Thailand has launched an aggressive campaign to monitor air and noise quality in Bangkok, but like Malaysia is having a difficult time reducing total emissions because of the rapid increase in automobile usage in the city. The amount of carbon dioxide emission per automobile has been decreasing due to the fact that newer engines and electronically controlled ignitions produce less. The lead content of gasoline has also been reduced from 0.84 grams per liter in 1984 to 0.15 grams per liter in 1993. Thailand has drafted emission standards which shall be the basis for factory licensing for cement, and the lead and steel industries.

ASEAN COOPERATION IN THE ENVIRONMENT

The ASEAN countries have also undertaken significant intraregional agreements on environmental issues beginning in 1977 when they undertook a program drafted with the assistance of the United Nations Environment Program (UNEP), and developed the ASEAN Environmental Program (ASEP) series of meetings and decisions among ASEAN countries. This process involved not only the identification of issues and enunciation of principles, but also the actual formation of environmental ministries and the setting aside of nature preserves.

The first ASEAN Experts Group on the Environment (AEGE) met in Jakarta in 1978 to assess the relevance of the UNEP-proposed collaborative activities and its compatibility with the national environment programs of individual countries. Subsequent AEGE meetings have been held in Penang (1979), Manila (1980), and Singapore (1981).

One of the early strategic goals of ASEP was the establishment of a special office, agency, or ministry for managing the environment in each of
the ASEAN countries. In a sense, the regular AEGER meetings rotating around the different ASEAN cities were designed to facilitate the process of domestic environmental institution-building through the catalyzing role of regional diplomatic channels.

In 1981, the First ASEAN Ministerial Meeting on the Environment was held in Manila. Despite the fact that only Singapore had a full-fledged Ministry of Environment at that time, the other four countries had begun to create environmental offices within the larger government ministries. During the meeting, the Manila Declaration on the ASEAN Environment was issued announcing the need to "foster a common awareness among the people of the ASEAN countries of the biological, physical and social environment and its vital significance for sustained development to proceed apace" as well as to "ensure, as far as practicable, that environmental considerations are taken into account in development efforts."

Thus, the first stage of ASEP (ASEPI) can be deemed productive in helping to create institutions within each participating country which focused on the environment and placing environment on each country's development agenda.

ASEP II (1982-1987) emphasized the promotion of projects intended to solve immediate regional needs such as:

- the reutilization of agricultural and agro-industrial residues
- the preparation of anti-pollution manuals
- the development of teaching curricula and demonstration aids
- the organization of workshops for economists and development planners on the integration of environmental factors in development planning and project evaluation.

During the Bangkok meeting in 1984, the ASEAN environment ministers echoed the UNEP recommendation calling for the development of a system of procedures for conducting environmental impact assessments (EIAs) which can be practically utilized within the ASEAN region. During this meeting, the ASEAN Declaration on Heritage Parks and Reserves named 11 national parks as heritage sites that should be protected for their biodiversity and cultural value.

In 1985, the ASEAN countries signed a protocol that contained forward-looking provisions on shared natural resources. The countries promised to (1) undertake impact assessments first before using shared natural resources; (2) notify in advance the other sharing contracting party; (3) upon request, enter into consultation with the other affected contracting party; and (4) inform the other sharing party of any emergency situations related to the use of the resource. These provisions have much in common with the NAFTA side accord, but are not accompanied by an enforcement mechanism.

The third phase of ASEP or ASEP III (1988-1992) vowed to solidify the regional institutional framework for cooperative ventures on the environment among the ASEAN countries. In this regard, the ASEAN Senior Officials on the Environment (ASOEN) was launched in 1990 as a mechanism for regular consultation among the chief environmental bureaucrats of ASEAN to allow for the timely exchange of information, technology, and resources in dealing with global environmental concerns among the member countries. The ASOEN was also mandated to ensure the integration of environmental considerations in the decisions of other ASEAN committees. Six working groups were established under the ASOEN with each ASEAN country being assigned as the coordinator of a group (see Box 5.1: The Working Groups of ASOEN). In 1993, at its fourth meeting held in Bangkok, ASOEN agreed to declare 1995 as "ASEAN Environment Year" for the purpose of heightening environmental awareness within ASEAN and intensifying regional activities on the environment.
Box 5.1: The Working Groups of ASOEN

- ASEAN Working Group on Nature Conservation (Malaysia), which is responsible for all aspects of nature conservation including biodiversity
- ASEAN Working Group on ASEAN Seas and Marine Environment (Brunei)
- ASEAN Working Group on Transboundary Pollution (Singapore), which is responsible for issues such as global climate change, depletion of the ozone layer, and toxic and hazardous wastes
- ASEAN Working Group on Environmental Management (Philippines), which is responsible for legal matters, environmental impact assessments, environmental monitoring, and environmental training
- ASEAN Working Group on Environmental Economics (Indonesia)
- ASEAN Working Group on Environmental Information, Public Awareness and Education (Thailand)

The Sixth ASEAN Ministerial Meeting on the Environment, held in 1994 in Bandar Seri Begawan, Brunei Darussalam, approved the ASEAN Plan of Action on the Environment for the period 1994-1998. The Plan incorporates the global thrusts and strategies of Agenda 21 which were agreed upon at the 1992 Rio Conference, as well as the objectives spelled out in the Singapore Resolution on Environment and Development during the Fifth Ministerial Meeting on the Environment in 1992. The Plan takes into account the need to harmonize the ASEAN Working Groups' objectives, identify priority regional issues including the environmental implications of AFTA, and establish ASOEN's position in international fora such as the Global Environment Facility (GEF) and G-77.32

ASEAN cooperation in the area of trade and the environment has been most prominent in the case of tropical timber exports. In June 1992, the Austrian Parliament passed a law requiring mandatory labelling of tropical timber imports. This required a mark on imports declaring that the product was from "sustainable forest management." In July 1992, the joint communiqué of the Twenty-fifth ASEAN Ministerial meeting responded to the law in the following words:

The Foreign Ministers reiterated that environment and development are mutually interrelated and mutually reinforcing. The right to development is a fundamental right of all peoples and measures for the protection of the environment should support economic growth and sustainable development. The Foreign Ministers reaffirmed that ASEAN should strengthen joint actions in countering the anti-tropical timber campaign in the major developed countries.33

Malaysia brought the case to the GATT in November 1992. However, even before a GATT ruling could be obtained (GATT panels having earned a reputation for lengthy deliberation), the tropical timber countries threatened to ban all
Austrian imports. Subsequently, in March 1993, Austria repealed its legislation.

The preamble to a pro-trade position illustrates the advanced thinking that the ASEAN countries have undertaken in considering environmental issues in their development process. Their suspicion of the boycott emanates from the importance these countries ascribe to export capability. Of the ASEAN countries, Thailand and the Philippines have already lost the capability to export tropical hardwood and have become net importers; objectively, these would have been slightly favored if the European tropical hardwood market had been cut off. Indonesia has expressed no strong objections to eco-labelling of forest exports. Nevertheless, the ASEAN countries have come out on a common stance that derives from a shared antipathy to protectionism in the name of the environment on the part of industrial economies. Nagara (1994:5) talks about a consensus to contest all restrictions to open trade in view of the critical role trade plays in the development strategies of these countries.

The ASEAN countries have interpreted eco-labelling as a nontariff barrier and have stated that they "oppose strongly any form of unilateral and discriminatory certification and labelling on tropical timber and products." The countries of ASEAN have committed themselves to meeting the International Tropical Timber Organization (ITTO) Sustainability Objective Year 2000 and have called on the UN for a Successor Agreement to ITTO to deal with the question of sustainable management of nontropical forests. The Singapore Declaration of 1992 released during the Fourth ASEAN Summit Meeting emphasized the need for developed countries to assist developing countries by providing them new and additional financial resources as well as the transfer of and access to environmentally sound technology at concessional and preferential terms.

Emphasizing their developing-country status, ASEAN environmental officials asserted during their meeting in Singapore in 1992 that efforts to force the ASEAN countries to protect the environment by reducing economic growth are little more than latent colonialism. They argued further that industrial countries should provide the money and expertise so that development in ASEAN can be ecologically sound. Malaysian Prime Minister Mahathir’s speech at the Rio Conference argued that developing countries should have an influence in the management of the Global Environment Facility that is consistent with their responsibility over the planet’s environmental assets, as opposed to being commensurate with their financial contributions, as is the norm in the case of the Bretton Woods agencies.

In July 1992, ASEAN officially called on the international community to provide the resources for environmental projects in developing countries:

It is imperative that the developed countries and the multilateral financial institutions implement the commitments made in Rio by granting new and additional financial resources and environmentally sound technologies to the developing countries.

The Singapore Declaration of 1992 released during the Fourth ASEAN Summit Meeting emphasized the need for developed countries to assist developing countries by providing them new and additional financial resources as well as the transfer of and access to environmentally sound technology at concessional and preferential terms.

ASEAN deliberations on the proposed amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer among the ASEAN environment ministers in Kuala Lumpur in 1990 raised questions about the commitment of the developed countries to transfer technology and provide financial assistance. The ASEAN Environment Ministers agreed in 1992 to cooperate in setting basic environmental quality standards and regulations at the national level, work towards harmonized quality standards in the region, and adopt long-term quantitative goals relating to ambient air and river water quality. The ASEAN Strategic Plan of Action on the
Table 5.1. National Ambient Quality Standards

<table>
<thead>
<tr>
<th>Country</th>
<th>Total Suspended Particulates</th>
<th>Sulfur Oxides</th>
<th>Carbon Monoxide</th>
<th>Photochemical Oxidants</th>
<th>Nitrogen Oxides</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>150 µg/m³ (24 hours)</td>
<td>365 µg/m³ (24 hours)</td>
<td>10 µg/m³ (8 hours)</td>
<td>160 µg/m³ (1 hour)</td>
<td>250 µg/m³ (1 hour)</td>
</tr>
<tr>
<td>Indonesia</td>
<td>260 µg/m³ (24 hours)</td>
<td>260 µg/m³ (24 hours)</td>
<td>2.26 µg/m³ (8 hours)</td>
<td>n.a.</td>
<td>92.5 µg/m³ (1 hour)</td>
</tr>
<tr>
<td>Malaysia</td>
<td>260 µg/m³ (24 hours)</td>
<td>105 µg/m³ (24 hours)</td>
<td>10 µg/m³ (8 hours)</td>
<td>120 µg/m³ (1 hour)</td>
<td>320 µg/m³ (1 hour)</td>
</tr>
<tr>
<td>Philippines</td>
<td>180 µg/m³ (24 hours)</td>
<td>369 µg/m³ (24 hours)</td>
<td>10 µg/m³ (8 hours)</td>
<td>120 µg/m³ (1 hour)</td>
<td>100 µg/m³ (1 hour)</td>
</tr>
<tr>
<td>Singapore</td>
<td>260 µg/m³ (24 hours)</td>
<td>365 µg/m³ (24 hours)</td>
<td>9 ppm</td>
<td>12 ppm</td>
<td>100 µg/m³ (1 hour)</td>
</tr>
<tr>
<td>Thailand</td>
<td>330 µg/m³ (24 hours)</td>
<td>300 µg/m³ (24 hours)</td>
<td>20 µg/m³ (8 hours)</td>
<td>200 µg/m³ (1 hour)</td>
<td>320 µg/m³ (1 hour)</td>
</tr>
</tbody>
</table>


Environment, adopted in April 1994, recognizes and responds to the Agenda 21 framework. 38

ASEAN has adopted the goal of achieving an ambient air quality below the 100 Pollutant Standards Index (PSI) by the year 2010. In setting the air quality standard goal, ASEAN is using a consolidated air quality index developed by the federal interagency task force in 1976. 39 The index is based on measures of five critical pollutant concentrations: total suspended particles (TSP), sulfur dioxide (SO2), carbon monoxide (CO2), photochemical oxides (ozone O3), and nitrogen oxide (NOX). PSI rises above 100 when any one of the five criteria pollutants rises above the air quality standard. In the United States, a level in the range 100-200 is considered "unhealthful," 200-300 as "very unhealthful," and above 300 as "hazardous." This index has been used in Los Angeles to warn people to stay indoors on certain days. Table 5.1 provides a comparison of existing ambient air standards between the United States and the ASEAN countries, which illustrates the comparability of air quality standards.

The ASEAN countries have also set the following goals for river water quality by the year 2010: pH: 6.0 to 8.5; DO (dissolved oxygen): 2 mg/l or more; BOD (biochemical oxygen demand): 10 mg/l or less; TSS (total suspended solid): 200 mg/l or less. It is clear that these standards owe much to the U.S. approach to water standard setting. Note that the water standards apply only to rivers, and the goals are not as extensive as provided for in U.S. water quality laws.
ASEAN'S ENVIRONMENTAL EFFORTS AND U.S. COOPERATION

In the 1984 Bangkok Declaration on the ASEAN Environment, the ASEAN countries recognized the importance of international cooperation to improve their capacity at and their need to obtain technology in environmental management, and to share experiences.\textsuperscript{40} Because of its experience and technology, the United States has been an important partner in ASEAN's environmental efforts.

In the early 1980s, ASEAN implemented a USAID (U.S. Agency for International Development) project directed towards improving watershed management, which also involved joint training activities for ASEAN officials. With assistance from the United States, Australia, and Canada, ASEAN undertook a series of efforts in the early 1980s on energy conservation and management. ASEAN cooperated with USAID in a project in 1983–1984 on a dialogue on living coastal resource management. Energy ministers have discussed the problems of overfishing and the need to install institutions at least at the national level to manage fishing resources.

More recently, in 1992, ASEAN and the United States (through the USAID) launched the United States–Asia Environmental Partnership. This program links U.S. environmental businesses to environmental programs in Asia, by providing providing market intelligence to U.S. companies seeking environmental markets in Asia and assisting ASEAN countries to transform environmental needs to business opportunities through professional exchanges. It provides for training programs to send U.S. citizens to Asia and Asians to the United States, and finances Environmental Action Teams to respond to identified environmental problems.\textsuperscript{41} While, on the one hand, the program does have a commercial cast and a significant part of the financing had been transferred out of funds that had previously supported the activities of nongovernmental organizations (NGOs), on the other hand, this program facilitates access to environmental resources for ASEAN governments. Its effectiveness will depend on the extent to which its activities exploit the mutuality of interests between the ASEAN governments and U.S. companies with environmental technologies to sell.

GATT AND THE ENVIRONMENT

GATT PRINCIPLES

The GATT panel ruling against the U.S. ban on tuna imports from Mexico represents a watershed in terms of global consciousness regarding the relationship between trade policy and the environment. The ruling itself is a good example of the key elements of the existing GATT approach to environmental questions.\textsuperscript{42}

Nondiscrimination

Nondiscrimination, a key principle of GATT, means that 'like' products must be treated equally regardless of country of origin, while national treatment requires equal treatment between imports and domestic products that are already in the domestic marketing sphere. However, because the existing GATT approach concerns itself wholly with trade measures, countries are free to impose environmental standards on all products in their domestic markets, so long as they treat imports and domestic goods that are alike equally. In the Mexican tuna case, the United States argued that its "embargo was an internal measure (which in the case of imports was enforced at the border in accordance with the Note Ad in Article III of the GATT) that treated foreign-caught tuna no less favorably than domestically caught tuna."\textsuperscript{43}

However, the GATT panel denied the U.S. claim since U.S. law did not also regulate domestically-caught tuna as a product and the embargo was determined to be, in fact, a trade measure.
Indonesia banned tropical timber exports by invoking GATT Article XX(g), the protection of domestic resources. The European Commission challenged Indonesia's ban on log exports in GATT, claiming the ban to be harmful to the furniture manufacturing industry in the EC. If the European objection is sustained, then it would appear that while trading partners cannot discriminate between goods based on their production method under GATT, they can force other countries to export commodities required for processing by their own industries.

Under Article XX, GATT does permit countries to control imports (and exports) in a discriminatory manner if the trade restrictions are "necessary" to protect the life or health or humans, animals, or plants (Article XX(b)) or are "primarily aimed at conservation" (Article XX(g)). In the tuna example, the GATT panel interpreted these exemptions to apply to the protection of life and health only within the geographical boundaries of each GATT contracting party. Since the U.S. law protected the life of dolphins outside the U.S. territory, it was determined that the U.S. could not appeal to this principle to discriminate against Mexican tuna; to rule otherwise would have meant allowing countries to infringe on other countries' rights to set their own environmental policies. The panel ruling, however, noted that contracting parties acting together could impose such a ban under GATT. A related case is Indonesia's (unilateral) ban against tropical timber exports (see Box 5.2: Indonesia's Ban on Tropical Timber Exports).

It is interesting to note that while the current GATT approach sets rules regarding the manner in which countries treat products, it has also ruled consistently against trade measures that are used to control the process under which the product is produced. Cases involving questions of production methods and the environment will likely face GATT in the future as there will be increasing attempts to regulate production methods on environmental grounds, especially because greater planetary damage typically occurs at the production stage rather than the consumption stage. Already, there exists scores of proposals for ecological labelling. In the Mexican tuna case, the GATT panel was also faced with the question of labelling under the U.S. Dolphin Protection Consumer Information Act. The panel ruled that labelling requirements concerning the purse-seine method of tuna fishing did not violate the prohibition against discrimination based on marks of origin under Article IX, as Mexico had claimed.

**Least-trade Restricting**

Another principle of GATT is the principle of "least-trade restricting." The enforceability of this provision depends on the GATT convention that the party accused of violating GATT rules is the party that must justify its position (rather than the aggrieved party demonstrating its loss). Thus, assuming that a country would be justified under Articles XX(b) and XX(g) to restrict trade, that country must demonstrate that it has chosen the "least-trade restricting" approach. In the Mexican tuna case, the GATT panel ruled that there was at least one other measure that the United States could have used, that is, the negotiation of international cooperative arrangements.

**THE URUGUAY ROUND**

Initial calls for formally embroiling environmental concerns in the activities of the World Trade Organization (WTO), the successor to the General
Agreement on Tariffs and Trade (GATT), were successfully resisted when the Uruguay Round negotiations ended in December 1993, but eventually a GATT Committee on Trade and the Environment was announced at the formal signing of the agreement in Makarresh in June 1994. This new GATT Trade and Environment committee has been given a broad mandate to consider the relationship between GATT approaches and trade measures for environmental purposes, "including those pursuant to multilateral environmental agreements." It will look into the transparency of trade measures used for environmental purposes, environmental measures that have a significant trade impact, the effect of dispute settlement mechanisms in trade and in environmental agreements, the effect of environmental measures on market access, and the issue of exports of domestically prohibited goods.

In addition, the Uruguay Round resulted in commitments by countries to harmonize their sanitary and phytosanitary measures to remove capricious, protectionist features. However, because these negotiations began before the Mexican tuna rulings and the consequent rise of environmental consciousness, other environmental issues were not an important feature of the Uruguay Round. It is thus likely that these issues will continue to be an important part of WTO activities. In fact, the GATT Mexican tuna panel itself pointed out that it would be better to amend Articles XX(b) and XX(g) rather than to interpret these in favor of the U.S. position. The new environmental consciousness found its greatest expression in the side agreement to the North American Free Trade Agreement.

CONCLUSION AND SUMMARY RECOMMENDATIONS

The countries of ASEAN, which think of themselves as being only at the start of broadening their trade with the rest of the world, must contend with an international trade regime that is being redefined with environmental considerations. In the case of the tropical timber boycott, the ASEAN members have proven their prowess in protecting their access to open trade, but in the meantime, the pressure towards regulation of trade regimes cannot but become more intense. Aside from the environment, there are two other issues (both of great concern to the United States) which promise (or threaten) to become part of trade rules: human rights (or the degree of democratization) and worker rights. Recent U.S.-Japan trade conflicts have also raised the possibility that the concept of trade regimes will be expanded to include domestic marketing systems.

Based on their recent experiences, the ASEAN countries might consider emphasizing three key positions in their participation in the design of new international trade regimes. Unfortunately, conventional economics provides minimal guidance in the nature of these positions.

THE LIMITATION OF UNILATERAL TRADE MEASURES

Neoclassical objections to the regulation of trade are expected to increasingly become ASEAN's main arguments against the encroachment of environment-related trade restrictions. In principle, it is not clear in each specific instance whether the sacrifice of an environmental objective in exchange for freer trade is necessarily the least-costly strategy. Based on past experience in which these free-trade arguments have not been necessarily decisive, and given the existence of other environmental treaties that are in defiance of free trade, ASEAN might find the GATT principle of multilateralism to be a more fruitful approach for dealing with environment-trade issues (and leave to tenured academics the rearguard action of resisting the connection between these two issues, assuming the connection can still be undone).

One can cite no recent experience in which a potentially protectionist environmental measure was not also a unilateral action on the part of a country or the European Community. Emphasizing the importance of multilateral action safeguards the
GATT tradition and protects developing countries' natural interests in open trade and access to industrial-country markets. The structure of the GATT/WTO itself differs substantially from other international economic organizations in that the voting power of countries does not depend on their economic power (as they do in the case of the two Bretton Woods institutions, the World Bank and the International Monetary Fund or in an attenuated way in the case of the United Nations Development Program where donor countries enjoy safe seats on the governing board); this provides developing countries more influence to hold industrial countries accountable to their own free-trade rhetoric.

Accepting environment as a legitimate trade concern, as long as these goals are realized through the multilateral approach, requires a willingness (and a corresponding capability) on the part of the ASEAN countries to actively participate (and not just in an obstructionist fashion) in any action that threatens to expand the role of GATT/WTO beyond trade issues. It will mean that the ASEAN countries must intensify their efforts to address environmental problems in their own region. For example, the tropical timber issue will continue to simmer and only an active stance on the part of the affected countries will prove effective in the long run.

AREAS FOR U.S.-ASEAN COOPERATION

The United States and ASEAN should expand their environmental cooperation. For the United States, these efforts will enhance its economic links with the region; for the ASEAN countries, cooperation with the United States provides them with access to additional resources for environmental protection and keeps them up to date on technology and ideas.

Improving Transparency of Environmental Measures

Both the United States and ASEAN have a common interest in ensuring the transparency of environmental trade measures. The inclusion of agriculture and agreements on sanitary and phytosanitary trade measures in the GATT/WTO system represent giant steps in the long process of limiting the extent of covert, nontariff barriers to trade. Developing countries are at a particular disadvantage in this type of protection which require a higher degree of technical sophistication in setting standards and in detection.

While transparency does not satisfy trade economists' preference for the elimination of all nontariff measures, transparency limits the egregiousness of such measures given that specific conditions are often an excuse for protectionism. Many environmental measures are specific to locations or tribal peoples within countries. One current example, the proposal to continue subsidizing dairy farming in the mountains of Switzerland to protect the environment in higher elevations, cannot even be associated with a people normally classified as tribal.

Recognition of Different Levels of Development

This is perhaps the most controversial issue that affects both trade and the environment, and is an issue that cuts both ways in both issues. ASEAN and other developing countries are seeking recognition of their developing-country status in international regimes, which, on the one hand, permits their full participation while on the other, requires of them relatively less stringent obligations and more adjustment time. Many of these adjustments in the trade area are already recognized in the differential time frames provided for in the Uruguay Round. These negotiations, however, did not deal with environmental issues directly.

On one end is the question of environmentally-motivated development assistance ("green aid") and access to technology, especially as agreed upon under Agenda 21. As was pointed out earlier, Malaysia has been particularly vocal in asking developed countries to recognize their greater culpability and capability in environmental issues
and to expand their efforts at international assistance to help developing countries protect their environment. The issue of technology transfer is a particularly sensitive one, since the protection (through trade measures) of mostly developed-country intellectual property rights came under the auspices of GATT/WTO.

The majority of these issues, as exemplified by the tropical timber issue, will concern the suitability of drastic trade measures to force developing countries to develop environment-friendly trade and production approaches in particular areas. ASEAN and the industrial countries must negotiate a combination of timing and official assistance that ensures that environmental disputes do not threaten the trade regime itself (and to ensure that the environmental objectives can truly be achieved). Again, the tropical timber issue would be an important start. Assistance in pollution abatement, sharing of information, and joint programs especially in marine resources are other possibilities. Moreover, industrial countries have long experiences in "discriminatory" assistance policies, inspired by Cold War considerations; with the end of the Cold War and so long as trade war disputes do not get in the way, these resources can be channeled to international environmental programs.

At the other end of the spectrum, and just as controversial, is the question of equity in consumption among the earth's population, an issue that is truly one of intragenerational rather than intergenerational transfer. A carbon gas tax in the United States, for example, will reduce greenhouse trends and recognize that the United States has the highest per capita consumption of these resources. The proper pricing of exports of natural resources potentially will provide higher incomes to developing-country populations, while consumers in industrial economies pay higher prices. These issues of pricing and subsidy removal are quite within GATT's and trade economists' purview, but the needed political pressures are still too feeble to pursue these types of objectives in an international arena.

SUMMARY

In conclusion, the environmental consequences of freer trade have become a significant element of the work plan of the WTO. The ASEAN countries look upon open trade institutions as being critical to their development and will increasingly face threats to their ability to export on the basis of environmental concerns. At the same time, these same countries also have an interest in improving their own environmental management. Our analysis of the complex set of issues leads us to recommend that the ASEAN countries involve themselves deeply in trade and the environment regime constructions as the best approach to pursue both the objective of greater trade access and a more sustainable natural environment.
NOTES


4. The theoretical issue is at what level one recognizes preferences to be aggregated; is it at the individual level, at the level of the local government, at the national level, or at the global level? If one only recognizes preferences at the individual level, almost all environmentally inspired trade measures are welfare-reducing (unless all individuals had the same preferences). The control of international trade in dangerous drugs, for example, is an aggregation of preferences against unrestricted drug trade of at least (participating) national preferences at the global level (perhaps in opposition to many individual preferences, otherwise the problem would be unimportant). In a world of diverse and wholly sovereign consumers, the control of trade in endangered species and the taxation of consumers in order to slow global warming is necessarily welfare-reducing.


7. The most famous being the 19th-century Swiss trade measures against meat from cows reared below a minimum height from sea level.

8. If indeed the soon-to-be established World Trade Organization (WTO) has the power to regulate trade practices between countries, then it offers a similar venue for the pursuit of global environmental objectives.


11. ASEAN Secretariat. 1994. ASEAN Strategic Plan of Action on Science and Technology. Jakarta: ASEAN Secretariat.


26. During the 1981 ASEAN Ministerial Meeting on the Environment, Indonesia was represented by the Minister of Development Supervision and Environment; Malaysia by the Minister of Science, Technology and Environment; the Philippines by the Minister of Human Settlements; Singapore by the Minister of Environment; and Thailand by the Minister of Science, Technology and Energy.


33. Joint Communique of the Twenty-fifth ASEAN Ministerial Meeting, p. 10.


36. ASEAN Statement of Forestry (1994).


38. ASEAN Secretariat. 1994. *ASEAN Strategic Plan of Action on Science and Technology.* Jakarta: ASEAN Secretariat.


40. ASEAN Secretariat (1994:76).


42. This section owes much to Bhagwati's (1994) explanation of GATT principles.


The U.S. Congress established the East-West Center in 1960 to foster mutual understanding and cooperation among the governments and peoples of the Asia-Pacific region, including the United States. Officially known as the Center for Cultural and Technical Interchange Between East and West, it is a public, non-profit institution with an international board of governors. Principal funding for the Center comes from the U.S. government, with additional support provided by private agencies, individuals and corporations and more than 20 Asian and Pacific governments.

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