

# 1980 BASIC AGREEMENT ON THE ASEAN INDUSTRIAL PROJECTS

*Signed in Kuala Lumpur, Malaysia on 6<sup>th</sup> March 1980*

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THE GOVERNMENTS OF THE REPUBLIC OF INDONESIA, MALAYSIA, THE REPUBLIC OF THE PHILIPPINES, THE REPUBLIC OF SINGAPORE, AND THE KINGDOM OF THAILAND,

Recalling the Declaration, of ASEAN Concord signed in Bali, Indonesia on 24 February 1976 which provides that member states shall take cooperative action in their national and regional development programmes, utilizing as far as possible the resources available in the ASEAN region to broaden the complementarity of their respective economies;

Recalling the Agreement on ASEAN preferential Trading Arrangements which relates to the framework for ASEAN Economic Cooperation;

Desiring to intensify cooperation in the field of industry;

Considering that the establishment of ASEAN Industrial Projects, through joint endeavours in the spirit of equality and partnership, can contribute to the acceleration of economic growth in the region;

have agreed as follows:

## CHAPTER I PURPOSES AND PRINCIPLES

### ARTICLE 1

The purposes of the present Agreement are:

1. To cooperate in establishing large-scale ASEAN Industrial Projects, particularly to meet regional requirements for essential products; and
2. To give priority to projects which utilize the available resources in the Member States and which contribute to the increase in food production and foreign exchange earnings or which save foreign exchange and create employment.

The provisions of this Agreement shall initially apply to the first five ASEAN Industrial Projects. They shall also apply to subsequent sets of projects, unless the ASEAN Economic Ministers decide otherwise. In the event modifications are found necessary in the subsequent sets in the light of experience gained under the first five ASEAN Industrial Projects, such modifications shall be effected in accordance with Chapter XVI of this Agreement.

### ARTICLE 2

The Contracting States, in pursuance of the purposes stated in Article 1, shall act in accordance with the following principles:

1. Each Contracting State shall have at least one ASEAN Industrial Project in its country.

2. Upon the allocation of an ASEAN Industrial Project to an ASEAN member country, similar new national projects can only be established after consultation with member countries and also on condition that the basis for the ASEAN Industrial Project is not affected by the proposed new national projects. However, similar national projects which have already been firmly planned and are already in their early stage of implementation before the allocation of the ASEAN Industrial Projects shall be allowed to proceed as national projects. Such projects shall be specified with particulars in the relevant Supplementary Agreement attached hereto.
3. In the allocation of the subsequent sets of ASEAN Industrial Projects, the benefits derived from the preceding ASEAN Industrial Projects shall be taken into account with a view to equalizing benefits in the long term.

## **CHAPTER II EQUITY**

### **ARTICLE 3**

1. Each of the first five ASEAN Industrial Projects shall have five (5) shareholder entities, except in the case of the ASEAN Industrial Project to be established in Thailand which shall have seven (7) shareholders.
2. Each shareholder entity shall be an agency or company which enjoys support and guidance from its respective Government of an ASEAN Member State and which is nominated by that Government to participate in the ASEAN Industrial Projects.
3. The shareholder entity of the host country shall have sixty per cent (60%) of the total equity of the respective ASEAN Industrial Project, with the balance to be shared by the shareholder entities of the other Contracting Parties.
4. The amount of equity participation in the shareholder entity by the Government itself, by the private sector in the country and by non-ASEAN interests shall be at the discretion of the respective Governments of the ASEAN Member States concerned provided that each of the Governments of the ASEAN Member States shall have at least one third of the said equity.
5. Majority ownership interest should at all times be held by the ASEAN shareholders.

## **CHAPTER III BOARD OF DIRECTORS**

### **ARTICLE 4**

1. The Board of Directors of a company that is to undertake an ASEAN Industrial Project (hereinafter referred to in this Agreement as "the Project company") shall consist of not more than eleven (11) members. As far as possible, the Board shall consist of nationals of ASEAN Member States only.
2. In the event it is necessary to appoint nationals of countries which are non-members of ASEAN to the Board of Directors, such appointment shall be approved by the members on the Board who are nationals of the ASEAN Member States.
3. In respect of membership in the Board of Directors of the Project company, membership in the Board of Directors by nationals of countries which are non-members of ASEAN

representing portfolio investors who have sufficient capital participation directly or indirectly in the project to warrant participation in the Board of Directors may be considered. Proposed membership in the Board of Directors of the Project company by direct investors representing non-ASEAN interests with operational, marketing, engineering or similar involvement's in the project shall be approved by the members on the Board who are nationals of ASEAN Member States.

## **CHAPTER IV FINANCING**

### **ARTICLE 5**

1. Wherever appropriate and after prior consultations, ASEAN shall approach prospective lenders as a group in securing loans for the ASEAN Industrial Projects.
2. Notwithstanding paragraph 1 above, with regard to each ASEAN Industrial Project, the host country, after prior consultations with other ASEAN Member States, can act on behalf of the other ASEAN Member States in respect of securing of loans, the result of which shall be reported to the other ASEAN Member States.
3. ASEAN Member States shall, in order to obtain the best possible terms in the securing of loans for the ASEAN Industrial Projects, adopt a coordinated approach to the raising of such loans whether simultaneous or staggered.
4. In the securing of loans for ASEAN Industrial Projects, it would be desirable to negotiate with the intention of attaining the three-fold objectives of:
  - (i) securing the maximum amount of concessional loans;
  - (ii) securing the greatest possible amount of untied financing; and
  - (iii) minimizing direct government guarantees.

In the event that guarantees are necessary, the host country of the project shall be responsible for such guarantees.
5. Each member country shall endeavour to exempt ASEAN Industrial Projects from domestic borrowing ceilings or limits on foreign borrowings.
6. After the incorporation of the Project company, all additional financial requirements further to that initiated by ASEAN Member States, which have been negotiated or re being negotiated up to the time the company is incorporated, shall be the responsibility of the management of the Project company.
7. The Project company shall not be incorporated until all matters pertaining to the joint Venture Agreement have been resolved.

## **CHAPTER V PREFERENTIAL TRADING ARRANGEMENTS**

### **ARTICLE 6**

ASEAN trade preferences shall be accorded to the products of the ASEAN Industrial Projects, pursuant to Article 10 of the Agreement on ASEAN Preferential Trading Arrangements.

## **CHAPTER VI TAXATION**

### **ARTICLE 7**

1. An ASEAN Industrial Project shall be deemed to have its fiscal domicile in the State of the host country and shall be taxable in that State according to the taxation laws of that State.
2. Corporate taxes, withholding taxes, dividend taxes and other forms of taxes applicable to each ASEAN Industrial Project shall be at the prevailing rate unless concessional rates have been granted by the host country of the ASEAN Industrial Project, taking into consideration the various incentives which may be granted under the provision of Article 8 and having regard to the nature and particular circumstances of the project.
3. An ASEAN Industrial Project shall not be subjected in the host country to any taxation or any requirement connected therewith which is more burdensome than the taxation and connected requirements to which similar enterprises in that country are or may be subjected.
4. In the negotiation and conclusion of bilateral tax treaties, special consideration shall be given to ASEAN industrial Projects.

## **CHAPTER VII INCENTIVES**

### **ARTICLE 8**

ASEAN countries shall offer ASEAN Industrial Projects the most favourable incentives under existing laws and policies and shall endeavour to make these incentives comparable to the treatment accorded to other ASEAN projects by the other host countries.

## **CHAPTER VIII REPATRIATION OF FOREIGN EXCHANGE**

### **ARTICLE 9**

The host country shall guarantee the full repatriation of capital and the remittance of returns, including dividends and interest, without undue delay. Such repatriation and remittance shall be allowed to be made in any freely usable currency as defined in the Articles of Agreement of the International Monetary Fund required by the recipient countries.

## **CHAPTER IX PROTECTION OF MINORITY SHAREHOLDERS**

### **ARTICLE 10**

The majority required for meetings of shareholders and the Board of Directors shall be two-thirds (2/3), whereas the majority required for liquidation, merger, increase and decrease of capital, issuance of debentures, and amendments to the Articles of Association or Articles of Incorporation whichever is applicable, shall be three-fourths (3/4), unless a higher price is required by the respective law of the host country.

## **CHAPTER X PRICING PRINCIPLES**

### **ARTICLE 11**

1. The products of the ASEAN Industrial Projects shall be sold at world prices between floor and ceiling prices based on minimum and maximum project rates of return, which pricing arrangement shall be applicable to products purchased by or through ASEAN Member States from ASEAN Industrial Projects under long term contracts. However, the floor and ceiling prices may be reviewed in the event of unexpected and abnormal developments or in the event of either exigency in world market conditions.
2. There shall be one free-on-board (f.o.b) selling price based either on long term contracts, term supplies of any similar contracts for the host country and the ASEAN markets for each product of an ASEAN Industrial Project.
3. Where an identical product is produced by more than one ASEAN Industrial Project, the floor, ceiling and actual free-on-board (f.o.b) selling prices of such products once adopted for one project shall apply to the other project or projects.
4. The actual selling price shall be determined by the project company based on the prevailing world market prices generally applicable to the ASEAN region.
5. Not with standing paragraph 4 above, there shall be:
  - (a) A floor free-on-board (f.o.b) selling price for each product produced by the ASEAN Industrial Project to account for project commercial viability.
  - (b) A ceiling f.o.b. selling price for each product produced by the ASEAN Industrial Project to take into consideration the general protection of the host country and ASEAN consumers.
6. (a) Floor and ceiling prices shall be calculated prior to commencement of commercial operation based on minimum and maximum rates of return on investment calculated by the discounted cash flow internal rate of return on investment (IRROI) method over the economic life of the project.
  - (b) Profit used in calculating the minimum and maximum IRROI percentages shall be profit before depreciation and interest on long term debt and after corporate income tax.
  - (c) Such floor and ceiling prices shall be adjusted periodically on account of:

- (i) changes in cost of production
  - (ii) currency adjustment
7. Minimum and maximum IRROI percentages shall be assessed for each ASEAN Industrial Project taking into account the relevant factors of the project.
  8. The floor and ceiling prices may be reviewed in the event of unexpected and abnormal developments in world conditions or in the event of either exigency. Such developments as aforesaid shall include the conditions when the prevailing world market price exceeds the agreed ceiling price by more than ten per cent (10%) or when the prevailing market price goes below the agreed floor price by more than ten per cent (10%).
  9. Selling prices throughout the project life shall be calculated in United States dollars.

## **CHAPTER XI PROJECT SCOPE**

### **ARTICLE 12**

1. Project cost shall include only the cost of infrastructure which can be shown to be directly a part of the project and only to the extent the infrastructure is required by the project itself and that such infrastructure costs are acceptable to the shareholders.
2. Such portions of infrastructure for the project that are larger than the minimum required by the project or are built to standards higher than needed by the project shall not be a part of the project cost but shall be for the account of the host country.

## **CHAPTER XII INSTITUTIONAL ARRANGEMENTS**

### **ARTICLE 13**

1. For the purpose of implementing this Basic Agreement and the Supplementary Agreement hereinafter specified in Article 16, there shall be a Joint Venture Agreement among the participating shareholder entities from ASEAN Member States for each ASEAN Industrial Project. The Joint Venture Agreement shall be in conformity with the provisions of the Basic Agreement and Supplementary Agreement.
2. The power to approve and review the Joint Venture Agreement shall be vested in the ASEAN Economic Ministers based on recommendations of the Committee on Industry, Minerals and Energy (COIME) in consultation with the Committee on Finance and Banking and the Committee on Trade and Tourism.
3. COIME shall review, supervise and monitor the implementation of the Basic Agreement and the Supplementary Agreement hereinafter specified in Article 16 up to the time of incorporation of the project company. All decisions of COIME shall be taken by consensus.

## **CHAPTER XIII CONSULTATIONS**

### **ARTICLE 14**

1. Each Contracting State shall accord adequate opportunity for consultations regarding such representations as may be made by any Contracting State with respect to any matter affecting the implementation of this Agreement. COIME may, at the request of any Contracting State, consult with any other Contracting State in respect of any matter for which it has not been possible to find a satisfactory solution during previous consultations.
2. If any Contracting State should consider that any other Contracting State has not carried out its obligations under this Agreement, the affected Contracting State may make representations or proposals to the other Contracting State concerned which shall consider said representation or proposal within sixty (60) days from receipt thereof.
3. If no satisfactory solution is effected between the Contracting States, the matter may be referred to COIME which shall consult with the Contracting States concerned and arrive at a solution mutually acceptable to the States concerned. If no satisfactory solution is arrived at in COIME, the matter shall be referred to the ASEAN Economic Ministers for the final settlement.

## **CHAPTER XIV BANKRUPTCY**

### **ARTICLE 15**

In order to maintain the required government equity in the shareholder entity, in the event that such entity becomes insolvent, the Contracting State responsible for the shareholder entity shall without undue delay, arrange the following:

1. Take all reasonable legal means to prevent the shares of the ASEAN Industrial Projects held by the said shareholder entity from being involved in any legal action taken by creditors.
2. If it is necessary for a new shareholder entity to take up all the shares owned by the insolvent shareholder entity, the new shareholder entity shall be accorded the same rights and shall undertake the same obligations as the insolvent entity.

## **CHAPTER XV SUPPLEMENTARY AGREEMENT**

### **ARTICLE 16**

Special provisions concerning each individual ASEAN Industrial Project shall be set out in a Supplementary Agreement which shall be deemed to be Part of this Basic Agreement.



## CHAPTER XVI AMENDMENTS

### ARTICLE 17

All articles of this Agreement may be modified through amendments to this Agreement agreed upon by consensus. All amendments shall become effective upon acceptance by all Contracting States.

## CHAPTER XVII ENTRY INTO FORCE

### ARTICLE 18

1. This Agreement shall enter into force on the thirtieth (30th) day after the deposit of the fifth Instrument of Ratification.
2. This Agreement may not be signed with reservation nor shall reservations be admitted at the time of ratification.
3. This Agreement shall be deposited with the Secretary-General of the ASEAN Secretariat who shall promptly furnish a certified copy thereof to each Contracting State.
4. Each Contracting State shall deposit its instrument of Ratification with the Secretary-General of the ASEAN Secretariat who shall promptly inform each Contracting State of such deposit.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed the Basic Agreement on ASEAN Industrial Projects.

DONE at Kuala Lumpur, in six originals in the English language this March 6, 1980.

For the Government of the Republic of Indonesia: **DR MOCHTAR KUSUMAATMADJA**, Minister for Foreign Affairs

For the Government of Malaysia: **TENGGU AHMAD RITHAUDEEN**, Minister of Foreign Affairs

For the Government of the Republic of Philippines: **CARLOS P. ROMULO**, Foreign Minister

For the Government of the Republic of Singapore: **S. RAJARATNAM**, Minister for Foreign Affairs

For the Government of the Kingdom of Thailand: **UPADIT PACHARIYANGKUN**, Minister of Foreign Affairs