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**Critical Evaluation of Investment Laws as a tool of
Progress within ASEAN**

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BRUNEI DARUSSALAM

Introduction to Investment Laws of Brunei Darussalam

1. Like the rest of the ASEAN member states, Brunei Darussalam considers both foreign direct investment (FDI) as well as domestic investment as being very important elements in its future national economic and social development plans. Although its current infrastructure may not yet be comparable to the original ASEAN member states, Brunei has been enacting legislation to both cater toward the provision of tax and other incentives in order to promote FDI.
2. From an overall perspective, the statutory laws, legislative enactments and policies of Brunei Darussalam are not seen to be prohibitive to foreign investors. Aside from the laws that regulate investment funds and telecommunications, the relevant authorities in Brunei regulates businesses without being overly intrusive. Other than mandatory laws relating to public safety, health and the employment of workers, the actual day to day conduct of business is conducted with minimal interference from the authorities. The private sector has long operated successfully and flourished in the nation. Many of the leading players in the private sector are members of trade associations such as the Brunei Malay Chamber of Commerce & Industry Brunei Darussalam, the Chinese Chamber of

The formal facilitating agencies for promotion of FDI in Brunei Darussalam

3. In accordance with its plans to diversify its economy away from overdependence on the hydrocarbon oil and gas industry, the Brunei Government has invested heavily in both setting up infrastructure as well as in human resources to promote FDI. It has set up several key facilitating agencies that include, the Badan Kemajuan Industry Negara Brunei Darussalam (BINA) under the Ministry of Industry and Primary Resources; the Brunei Economic Development Board (BEDB), which is a statutory body; Sungai Liang Industrial Park Authority (SPARK) as well as government owned companies such as Semaun Holdings Sendirian Berhad. Various different legislations had been enacted and implemented to allow various forms of investment incentives including tax breaks, to certain key industries. Due to the constraints of time, this paper will only set out a brief outline of recent and relevant investment legislation.

4. Brunei Government owned or government related companies have over the years entered into joint ventures with foreign investor partners, whilst other facilitators such as the BINA have been successful in enticing foreign direct investments into the country. In order to better coordinate the nation's international trade matters with its foreign affairs, the entire international trade division of the Ministry of Primary Resources was transferred to go under the jurisdiction of the Ministry of Foreign Affairs and Trade. The Government has encouraged cross border trade, commercial activities and investments with immediate neighbouring countries to flourish and cross-border investments have increased noticeably over the three years.

The Brunei Economic Development Board

5. The Brunei Economic Development Board is a corporate body incorporated by way of statute¹. It has power under the provisions of the legislation to acquire and dispose of property and may sue and be sued in its corporate name and may perform other acts as corporate bodies corporate perform. The BEDB was established on the 26th November 2001 with the mission to promote Brunei Darussalam as a land of opportunity for investors. After an initial hiatus in the first four years of its establishment, the BEDB focused its efforts on a number of other industrial and petrochemical projects that could be located at the Sungai Liang Industrial Park². Since 2007, the BEDB has also been looking into developing an island known as the Pulau Muara Besar project and it had intended develop a deep sea container port. The BEDB had called for bids in 2007 from international port operators that may be interested to invest in and operate the container port. Although there has been a memorandum of understanding entered into with a Philippine port operator, Container Terminal Services Inc (ICTSI), it is not clear whether any definitive agreement has been signed with the selected operator yet. The BEDB also plans to develop an export processing zone and an industrial park at Muara Port to complement and support the operations of the container port. To this end, a Master Planner agreement has been with Surbana consortium from Singapore for the latter to conduct studies for the development of the island.

6. In January 2003, BEDB had made announcements that it had all the necessary tools in place to attract major investments. It had clearly stated its strategy to jumpstart Brunei's diversification and announced a two-pronged action plan that would draw in US\$4.5 billion in new investments and create at least 6,000 new permanent jobs by 2008. Unfortunately, none of these two goals have materialised to date and it is not known if the BEDB has actually been able to bring in more than US\$20 million in FDI since 2003. The BEDB has however been successful

¹ The governing legislation that regulates the BEDB is the Brunei Economic Development Board Act, (Revised 2003, CAP 104).

² <http://www.bedb.com.bn/login/press/bedb-281007.php>

in its more recent focus in aiming to build 6000 low costs houses³ under the Brunei National Housing Scheme.

7. The aim of the National Housing Scheme is to assist in social developments of the citizens and to eventually provide housing for all Bruneian citizens⁴. It remains hopeful that the BEDB will be able to achieve its potential in attracting and drawing in a key foreign investment soon and one that is not dependent on cheap gas or oil that is to be supplied by the country's reserves⁵.
8. The Brunei Government has remained totally committed to the goals of making Brunei a good venue for FDI and has remained steadfast in supporting the efforts of the BEDB. It has recognized the progress made by the key players in the private sector and has called for those key players within the private sector to assist the efforts of the BEDB.
9. The Brunei Government has recognized that that the competitiveness of the country as a hub for attracting FDI is important and that there must be a multi-stakeholder undertaking that should involve the policy-makers and implementers within the government and the key players within the private sector⁶.

The Sungai Liang Industrial Park Authority

10. On the 7th February 2007, the BEDB signed a contract with a local contractor to open the first phase of the BEDB's plan to develop a 271 hectare site situated next to existing upstream gas refinery facilities at Mukim Liang into an industrial park.

³ http://www.bt.com.bn/en/home_news/2009/04/12/bedb_efforts_for_4_000_new_houses_lauded

⁴ See http://www.bedb.com.bn/backup/documents/BEDB_Infrastructure_Projects.pdf

⁵ The BEDB has been looking to set up a waste incinerator and has proposed to convert the main rubbish dumpsite into a park for recreational activities and to move the current dumpsite to be located next to the existing premises.

⁶ See Speech by Dato Seri Paduka Eusoff Agaki Haji Ismail, the Honorable Deputy Minister at the Prime Minister's Office that was presented at BEDB Stakeholders' Forum "Aligning Interests; Building Partnerships" on the 16th January 2008.

(http://www.jpm.gov.bn:81/index.php?option=com_content&view=article&id=105:bedb-stakeholders-forum-aligning-interests-building-partnerships&catid=37:speeches&Itemid=196)

The Sungai Liang Industrial Park is meant to act as host to a number of petrochemical projects that include downstream small and medium enterprises (SMEs). The Sungai Liang Industrial Park Authority Order, 2007 was enacted to give statutory force and power to achieve this one-stop agency that has been designed to cut across bureaucracy and to lessen the difficulties that had been associated with local government processes⁷. The SPARK Order was intended to provide for a better working partnership between the law and businesses as well as to look after the safety concerns of the local community located immediately next to the vicinity of the park. The Sungai Liang Industrial Park has been earmarked for development into a world-class industrial site, and to date it has encouraged the setting up of a methanol plant by a consortium comprising of Mitsubishi Gas Company, Itochu Corporation and the Brunei National Petroleum Company Sdn Bhd.

11. The SPARK Authority is a body corporate with perpetual succession and a common seal with power under the provisions of the legislation to acquire and dispose of property. It may sue and be sued in its corporate name and may perform other acts as bodies corporate may perform. The Authority under the SPARK Order wields an enormous amount of authority⁸ and is able to exercise (with the approval of His Majesty the Sultan and Yang Di Pertuan of Brunei Darussalam) rights to exercise a wide range of laws listed under twenty different legislation with respect to the Sungai Liang Industrial Park⁹. It is very clear that

⁷ See also Sungai Liang Authority Act, Revised Ed. 2009 (CAP 200), which is the revised legislation that governs the activities of the Sungai Liang Authority and its activities.

⁸ Section 7(1) of the SPARK Order provides that “*The Authority shall have the power to do all such acts or take such steps for the purpose of the discharge of its functions under this Act (including such directions and functions as the Minister may issue or confer under section 6(2)) and, subject to section 10, under any other written law or which is conducive or incidental to the discharge of any of those functions.*”

⁹ Some of these legislation that the SPARK Authority is mandated with the right to exercise include the Electricity Act (Chapter 71); the Fire and Rescue Act (Chapter 82); the Forest Act (Chapter 46); the Immigration Act (Chapter 17); the Industrial Co-ordination Order, 2001 ; the Investment Incentives Order, 2001; the Labour Act (Chapter 93); the Land Acquisition Act (Chapter 41); the Land Code (Chapter 40); the Merchant Shipping Order, 2002; the Miscellaneous Licences Act (Chapter 127); the Poisons Act (Chapter 114); the Ports Act (Chapter 144); the Prevention of Pollution of the Sea Order, 2005; the Town and Country Planning (Development Control) Act (Chapter 143); the Water Supply Act (Chapter 121) and the Workmen’s Compensation Act (Chapter 74).

the main objective is to enable the SLA to administer the Sungai Industrial Park as the sole authority to minimise bureaucracy to facilitate dealings with foreign investors as well as foreign and local stakeholders. Unfortunately, despite the large amount of investment and efforts made by the Brunei Government into the SPARK since 2007, there does not seem to have been any evidence of any new investments coming into the SPARK site apart from the initial Methanol Plant that was first planned in 2004¹⁰.

Financial, banking and investment management sectors

12. Brunei considers that the development of its financial, banking, Islamic banking, and international financial and investment management sectors is an important issue. A comprehensive range of legislation was enacted for the setting-up of businesses relating to international finance and banking, insurance, funds, trust and other related business activities and services. Some of the legislation that has been enacted in the financial sector include the International Business Companies Order, 2000; International Limited Partnerships Order, 2000; Mutual Funds Order, 2000; International Trust Order, 2000; Registered Agents and Trustees Licensing Order, 2000; the Securities Order, International Banking Order, 2000; Banking Order, 2006; International Insurance and Takaful Order, 2008; Money Laundering Order, 2000; Criminal Conduct (Recovery of Proceeds) Order, 2000; Anti-Terrorism (Financial & Other Measures) Order, 2002; Emergency (Drug Trafficking) (Recovery of Proceeds) Order, 1996; Distress Act (Revised 2009) and Asian Development Bank Act, 2009.

Industrial Coordination Order, 2001

13. The Industrial Coordination Order, 2001 (ICO) was enacted to provide for and facilitate the coordination and development of manufacturing activities in the country. Manufacturing activities are a licensed activity and is has been widely defined under the ICO Order to include the making, altering, blending, ornamenting, finishing or otherwise treating or adapting any article or substance,

¹⁰ <http://www.bedb.com.bn/login/press/bedb-200904.php>

the assembly of parts and ship repairing. Through this legislation, the Industrial Co-ordination Advisory Council was established and it is comprised of representatives that come from various government departments and agencies, including the Brunei Industrial Development Authority of the Ministry of Industry & Primary Resources and the BEDB, to advise the ministry on matters relating to industrial activities, especially on licensing and industrial building approval as well as to implement and review all the policies that relate to such matters.

Business Vehicles used by Foreign Investors

14. The most common form of business entity for private business activities in Brunei is the limited liability company (Sendirian Berhad). This form of legal entity is based on the English Company Law model and it essentially is a legal entity that has a minimum of 2 shareholders and 2 directors and is governed by its Articles of Association and has its authorized capital divided into shares. This model of business has generally been working well and is very popular and had encouraged foreign investors to enter into joint ventures with local Brunei counterparts wherein the shares were agreed and divided up between the contracting parties.

Intellectual Property Laws and Investment laws

15. Conscious of the fact that intellectual property laws go hand in hand with some of the sectors concerning Foreign Direct Investments, Brunei Darussalam has been careful to enact and enforce legislation on the intellectual property rights of manufacturers and rights holders. The Emergency Copyright Ordinance (2000), is modelled on the 1988 UK Copyright Act and had entered into force in May 2000. It provides protection for temporary copies. The enforcement provisions of the Ordinance has acted to fight copyright piracy and has provided for both civil and criminal remedies to be imposed upon those found guilty of committing IP piracy. The Ordinance allows for the confiscation and destruction of any proven infringing equipment and materials.

16. The Trade Marks Act¹¹ was enacted and entered into force. On the 30th December 2000. The Brunei Trade Marks Act in effect has updated the laws of Brunei to be compatible with major intellectual property treaties such as the Paris Convention, WTO and TRIPS Agreement. It bears much similarity to the UK Trade Marks Act 1994. Trade Mark rights are actively enforced in Brunei and the authorities have been very receptive to complaints on infringement by rights holders of trade marks. The Brunei Attorney General has also issued various press statements throughout the last few years to confirm that the relevant authorities have been very responsive to complaints lodged by intellectual property right holders and that action has been taken on all complaints that have been made.

Commercial Arbitration and FDI

17. The Attorney General's Chambers had worked hard with some input from the Arbitration Association Brunei Darussalam to update the existing arbitration legislation of Brunei to meet the requirements of foreign and local investors. The current arbitration legislation of Brunei is predominantly based on the old English Arbitration Act that was first enacted in 1950¹².

18. The new Arbitration Order, 2009 that regulates domestic arbitrations and the International Arbitration Order, 2009 that regulates international arbitration are both expected to come into force before the end of 2009. The new Arbitration statutes are based on the UNCITRAL Model Law on International Commercial Arbitration and follow the international practice and principle that the national courts may only support but not interfere with the arbitration process. Under the two new Arbitration legislation, The Arbitration Association Brunei Darussalam ("AABD") has been statutorily appointed as the default appointing body in the event of default or failure by the parties to appoint¹³.

¹¹ Trade Marks Act (CAP 98) (Revised Edition, 2000)

¹² Arbitration Act (CAP 173). It also has some features of the Hong Kong Arbitration Ordinance (CAP 341, 1982).

¹³ Section 13(8) of the Arbitration Order, 2009 and Section 8(2) of the International Arbitration Order, 2009.

19. In line with the current approach of The UNCITRAL Model Law on International Commercial Arbitration was revised in December 2006¹⁴, the incoming Brunei International Arbitration Order, 2009 will endow the arbitral tribunal with the powers to grant interim measures, as per the recommendations of the revised Article 17.

20. Once the Brunei International Arbitration Order, 2009 comes into force, arbitral tribunals sitting in Brunei will be endowed with statutory powers to make orders for (a) security for costs; (b) discovery of documents and interrogatories; (c) giving of evidence by affidavit; (d) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute; (e) taking samples from any property which forms part of the subject-matter of the dispute; (f) the preservation and interim custody of any evidence; (g) securing the amount in dispute; (h) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and most importantly the general power to issue an interim injunction or “any other interim measure”. This should give more confidence to international investors that their investments in Brunei Darussalam will be protected and that they have the recourse to resort to international arbitrator before a neutral arbitral tribunal instead of subjecting themselves purely to the national courts of the host state.

General Conclusion on investment laws and investment in Brunei Darussalam

21. There have been noticeable increases in new FDI in Brunei over the last few years in the private sector and many joint ventures have been set up between local and foreign parties.

¹⁴ See the 61st Session of the General Assembly by Resolution No A/RES/61/33. In the context of Court-Ordered interim measures, Art 17J was added to the Model Law 2006 and it provides that :

“A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.”

22. Unfortunately, despite the genuine efforts and resources plied into the formal facilitating agencies for development of the economy and the attractiveness of Brunei Darussalam as a good hub of investment, there does not seem to have been much evidence of any major FDI investment secured by the BEDB or SPARK. However this is understandable as the teams of personnel are relatively inexperienced in comparison with those from other ASEAN countries like the Singapore BEDB.
23. However, despite the comparatively inexperience of the facilitators in attracting FDI into Brunei Darussalam, one must remind potential investors that Brunei Darussalam remains a very attractive country to invest into. There has been much progress made by the ordinary players of the private sectors in Brunei Darussalam in terms of cross-border trade and investments. In addition to the Brunei Governments staunch commitment to the Rule of Law and the availability of modern investment friendly legislation, there are many other important factors that makes the country to be a very attractive destination.
24. As a result of the very wise leadership and practical vision of His Majesty the Sultan and Yang Di Pertuan of Brunei Darussalam, the country remains one of the most economically and political stable country in ASEAN. It has maintained its status as a prosperous and happy nation and has excellent infrastructure. There is no personal income tax, no sales tax, manufacturing and export taxes¹⁵. Approved foreign investors under the various investment legislation enjoy a company tax holiday of up to 20 years. Full or partial relief from import duties under the Customs Act (CAP 36) is available to a pioneer enterprise or an export enterprise payable on machinery or equipment, prefabricated building or factory structures

¹⁵ Brunei Darussalam does not impose any form of income tax or service tax on personal individuals which includes sole proprietorship and partnerships. The Income Tax (Amendment) Order 2001 allows deduction of taxes for companies involved in the export market. It also allows for development expenditure as well as deduction of taxes for companies who have expended monies on research and development. Brunei Darussalam has also entered into tax treaties with other countries to provide for tax relief from double taxation for both individuals and companies.

- for the plant or factory in Brunei provided that such materials of equal price and quality are not being produced or available in Brunei.
25. The regulations relating to foreign ownership and equity are extremely fair to foreign investors and flexible and in many sectors, the laws allows for 100% foreign ownership. There are no major difficulties in hiring both local and foreign human manpower and resources, ranging from labourers to managers.
26. Due to the abundant supply of gas and oil, the cost of utilities in the country is amongst the lowest in the region. Brunei occupies a great strategic location within the 10 ASEAN member states. The flying time from Bandar Seri Begawan to major ASEAN cities such as Bangkok, Ho Chi Minh city, Jakarta, Kuala Lumpur, Manila and Singapore are all between two to three hours.
27. The living conditions in Brunei Darussalam are among the best in the ASEAN region and the crime rate and the degree of pollution are amongst the lowest throughout the world¹⁶. The local market is still considered to be relatively lucrative there is little or no local competition in most sectors. These factors give Brunei Darussalam an additional edge over many countries competing for FDI and remains a very good place for safe inward investments.
28. The investment laws of Brunei Darussalam clearly serve as an important part of the future of the country and as a tool of progress in the continued welfare and sustainable development of the nation. It remains to be seen if the ASEAN member states will jointly agree to enact new harmonised standards for investment laws and regulations that will assist to form the ASEAN Economic Community (AEC) by 2020¹⁷.

¹⁶ The United Nations Human Development Index ranks Brunei as 27th best place in the world to live in. <http://data.un.org/DocumentData.aspx?id=116>

¹⁷ Article 1(5) of the ASEAN Charter aims “*To create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital.*”