

Informed Counsel

Analysis of Recent Legal Developments in Thailand and Vietnam



Focus on the ASEAN Economic Community

In 2015, the ASEAN Economic Community (AEC) is set to come into effect, creating a regional market of 600 million consumers. With economic integration looming, this special issue of *Informed Counsel* provides insight into what businesses can expect as the AEC becomes a reality. The articles cover:

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We hope you find this content useful as you evaluate how the AEC will benefit your company's operations in Thailand, Vietnam, and throughout Southeast Asia.

ASEAN Economic Community 2015 and Thailand

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The Association of Southeast Asian Nations (ASEAN) is a regional association composed of the ten countries comprising Southeast Asia—Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar (Burma), the Philippines, Singapore, Thailand, and Vietnam. Situated in a region covering an area of 4.46 million km² (equivalent to approximately 3% of the total land area of the earth), these countries are home to a burgeoning population of 600 million people, which is nearly 9% of the world's population. As a single economic block, its combined nominal GDP of USD 2 trillion ranks ninth in the world. Although relatively small compared to China, Japan, and Korea, ASEAN comprises one of the most dynamic emerging economies of the world, with an average nominal GDP growth rate among the ASEAN-6 (Singapore, Malaysia, Indonesia, Thailand, Vietnam, and the Philippines) of 4.5% during 1989–2009, and poised to grow between 5.7% and 6.4% in 2011–2012. In contrast, the global economy is expected to grow by only 3.3% and 3.7% in 2011 and 2012.

What Is the AEC?

ASEAN was formed in 1967 under the “three pillars” of regional cooperation, namely security, socio-cultural integration, and economic integration. In 1997, ASEAN leaders declared the ASEAN Vision 2020, which aimed to transform ASEAN into a “stable, prosperous and highly competitive region with equitable economic development, and reduced poverty and socioeconomic disparities.” Building on this vision, at their 2007 Summit ASEAN leaders affirmed their strong commitment to accelerate the establishment of an ASEAN Economic Community (AEC) by 2015.

The AEC aims to make ASEAN a more dynamic and competitive economic block by making it a single market and production base by 2015 governed by the principles of an open, outward-looking, inclusive, and market-driven economy.

As a single market and production base, the AEC comprise the following five core elements: (1) free flow of goods; (2) free flow of services; (3) free flow of investment; (4) freer flow of capital; and (5) free flow of skilled labor.

Free flow of goods. The ASEAN Free Trade Area (AFTA) has already achieved great strides in removing tariffs among ASEAN countries. Under the AEC, tariffs on all intra-ASEAN goods are expected to be completely eliminated in accordance with the schedules and commitments set out in relevant agreements and protocols. In addition to zero tariffs, however, the AEC aims for the removal of non-tariff barriers and increased trade facilitation. The main focus toward 2015 will thus be on the full elimination of non-tariff barriers by enhancing transparency of non-tariff measures and formulating regional rules and regulations consistent with international best practices.

With respect to trade facilitation, the AEC aims to simplify, harmonize, and standardize trade and customs processes, procedures, and related information flows by establishing a trade facilitation cooperation mechanism, customs integration and ultimately, create an ASEAN Single Window (ASW). Setting up an ASW, however, would require all ASEAN members to first make operational their respective National Single Window.

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Free flow of services. The AEC envisages the complete removal of restrictions to the provision of services and the establishment of companies across national borders within the ASEAN region by 2015, subject to national regulations. Separate negotiations with respect to specific sectors, such as air transport and financial services, are being undertaken by respective ministerial bodies. ASEAN also aims to establish mutual recognition arrangements for professional services, starting with architectural services, accountancy services, surveying qualifications, medical, and dental practitioners.

Free flow of investment. The AEC is striving to establish a free and open investment regime to enhance ASEAN's competitiveness in attracting foreign direct investment and to promote intra-ASEAN investment. The goals include enhanced investment protection, facilitation, and cooperation, as well as progressive liberalization of member countries' investment regimes.

Freer flow of capital. The AEC aims to strengthen ASEAN capital market development and integration through harmonization of capital market standards in areas such as offering rules for debt securities, disclosure requirements and distribution rules, and cross-border capital raising activities. It also aims to allow greater capital market mobility by ensuring capital account liberalization, albeit within the scope of each member country's national agenda and economic readiness.

Free flow of skilled labor. The AEC is moving toward managed mobility or facilitated movement of natural persons in trade in goods, services, and investments through visa facilitation and issuance of employment passes for ASEAN professionals and skilled labor. It is envisaged that by 2015 there will be a complete free flow of services. To this end, the ASEAN member countries are working toward harmonization and standardization by enhancing increased mobility of students and staff within the region, developing core competencies and qualifications for occupational trainers' skills, and strengthening the research capabilities of each ASEAN member country in terms of promoting skills and job placements and developing labor market information among the member countries.

AEC Scorecard and Thailand

The AEC Blueprint, adopted in November 2007, outlines the measures to be taken and the schedule of implementation. A scorecard mechanism was developed to monitor the schedule of implementation, and in 2010, the first AEC Scorecard was published, covering the first two-year period (January 2008 to December 2009). The Scorecard noted that the implementation of the regional commitments during the period under review was generally positive, with around 73% of the AEC legal instruments targeted within this period having entered into force.

Where does Thailand stand in comparison to its neighbors? Thailand's progress against the first AEC Scorecard is outlined below.

Free flow of goods. Thailand has already commenced on its National Single Window together with five other ASEAN member countries (Brunei, Indonesia, Malaysia, the Philippines, and Singapore). Thailand also ratified the ASEAN Trade in Goods Agreement (ATIGA) in April 2010, allowing for the agreement to finally enter into force in May 2010. ATIGA has been touted as one of the region's landmark economic agreements to date, and in the words of the ASEAN Secretary-General, Dr. Surin Pitsuwan, "is a major achievement towards the establishment of a single market and production under the ASEAN Economic Com-

munity 2015." ATIGA's scope is comprehensive as it focuses not only on tariff liberalization and non-tariff measures, but also on the simplification of the Rules of Origin and their implementation.

Free flow of services. The ASEAN member countries have so far negotiated eight packages of commitments under the ASEAN Framework Agreement on Services (AFAS). The AFAS covers the liberalization of:

Business services	Professional services
Construction	Distribution
Education	Environmental services
Healthcare	Maritime transport
Telecommunications	Tourism

Thailand has entered into the seventh package of the AFAS, pledging commitment to allow for higher foreign equity ownership, but has not ratified the protocol itself. To date, only Malaysia and Singapore have ratified the protocol to implement this seventh package of commitments.

Free flow of investment. Thailand has not yet ratified the ASEAN Comprehensive Investment Agreement, which currently has already been ratified by eight ASEAN member states. The only other non-ratifying country is Indonesia.

Freer flow of capital. Most ASEAN countries, including Thailand, no longer have restrictions on inward and outward foreign investments. The ASEAN member countries are, however, still working on monetary and financial integration in the four areas: (1) capital market development; (2) liberalization of financial services; (3) capital account liberalization; and (4) ASEAN currency cooperation. Integration is implemented through several rounds of negotiations, with each round resulting in packages of commitments from each ASEAN member state in each agreed economic sector/sub-sector and mode of supply.

Currently, each member state is at varying stages of preparing and implementing national work programs, including capacity building. With respect to financial services, in 2008 Thailand ratified the Protocol to Implement the Fourth Package of Commitments on Financial Services under the AFAS. The Protocol to Implement the Fifth Package was signed on May 4, 2011, but has not been ratified by any member state to date.

Free flow of skilled labor. Thailand ratified the ASEAN Framework Agreement on Mutual Recognition Arrangement (MRA) in May 2002, which came into effect in December 2002 upon the ratification of Laos, the last member state to do so. To date, seven MRAs have been signed, consisting of medical and dental practitioners, engineering services, nursing services, architectural services, surveying qualifications, and accountancy services. Thailand has not ratified any of these seven MRAs, and with respect to engineering services, it came short of ratification by merely sending a "notification of participation" to the Secretary-General.

Thailand's Legal Hurdles

Thailand's investment laws have always oscillated between protectionism and liberalization. Recognizing the importance of foreign investment for its economic growth, Thailand has through the years relaxed restrictive investment laws and regulations. At the same time, however, it has stubbornly held on to some antiquated laws restricting foreign participation in industries where Thai nationals are deemed to not yet be competitive. For Thailand to fulfill its commitments to various AEC agreements and protocols, it has to revamp its two major legal stumbling blocks: the Foreign Business Act and the Alien Employment Act.

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Foreign Business Act. The Foreign Business Act (FBA) restricts the participation of aliens in certain business activities. The activities in which alien participation is limited are divided into three groups: List 1 principally contains agricultural and land-dealing activities; List 2 includes businesses related to national safety or security or involving art and culture, tradition, folk handicraft, or natural resources and environment; and List 3 contains most services, including legal and accounting. Foreigners cannot engage in List 1 activities at all, while the activities under List 2 and List 3 may be pursued if the foreigner obtains an alien business license.

The FBA obviously runs counter to the principles espoused by the AEC. The lists should be narrowed to allow foreign participation in the various sectors targeted by the AEC. Where a major overhaul of the FBA would cause delays in the implementation of AEC commitments, Thailand could, alternatively, expand the list of projects eligible for investment promotion by the Board of Investment (BOI). The BOI is a government agency empowered to grant a wide range of fiscal and non-fiscal incentives and guarantees to qualified investment projects in an effort to attract foreign investment in the restrictive legal environment of the FBA.

Alien Employment Act. The Alien Employment Act requires a work permit for all aliens working in Thailand.

Under the Act, “work” is defined broadly to include work involving physical strength or knowledge whether or not done for money or other remuneration. Only a few exceptions are granted such as to members of diplomatic or consular delegations, the United Nations, and other international agencies, as well as pursuant to certain treaties and authorization by the Council of Ministers. More exemptions should be enacted in order for Thailand to be able to commit to the various MRAs which are essential for a truly effective free flow of skilled labor.

Moving Forward

The famous adage, “there is safety in numbers” could not have applied more aptly than in this era of increasing globalization where a country’s socioeconomic growth hinges on the strength of its regional ties. Yet, each ASEAN member country still struggles to align its national laws and legislation to implement the AEC agreements and protocols. In Thailand, the lack of understanding of the AEC within the private sector, the civil society, and even the government has contributed to delays in implementing the regional commitments. Any delay in Thailand’s ratification of its outstanding agreements and protocols will only create backlogs of unimplemented commitments with the onset of more commitments and measures in accordance with the AEC Blueprint. It is therefore imperative that Thailand’s leaders actively promote better understanding of the AEC through regular consultations with the private sector, academia, and the civil society in general. 🙌