

Legal Aspects of the ASEAN Economic Community

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The members of the Association of Southeast Asian Nations (ASEAN) are attempting to create an ASEAN Economic Community (AEC) by 2015. The AEC would create a single market of over 600 million people encompassing 10 countries. However, unlike the EU, with which the AEC is often compared, the AEC does not have a single regulator. Nor does it have the comprehensive set of laws and regulations that a nation-state would have. As a result, the AEC presents the investor with a more complex set of issues than either a nation-state or a more established regional bloc would.

OPERATING STRUCTURE OF ASEAN

The foundational document of ASEAN is the ASEAN Charter, signed in 2007. The Charter formalized many of the institutional and operational aspects of ASEAN, which had previously operated on an informal basis only.

The supreme authority in ASEAN is the ASEAN Summit of national leaders. Decisions made at the Summit represent the consensus among the ASEAN nations, although their legal authority has not been tested. The Charter establishes semiannual meetings, along with special meetings when necessary. The chairmanship of ASEAN is held each year by an ASEAN member, with the rotation based on alphabetical order of the members' names in English.

The Charter establishes ministerial level councils to handle substantive matters. The ASEAN Economic Community Council made up of economic ministers meets semiannually and coordinates the development of the AEC. The Council is supported by the Senior Economic Officials Meeting (SEOM), a grouping of ASEAN national government bureaucrats which meets frequently between Council meetings.



The Royal Thai Embassy in Washington DC flying the ASEAN and Thai flags in celebration of ASEAN's 44th Anniversary.

The Charter also establishes that each ASEAN member station a permanent representative in Jakarta, location of the ASEAN Secretariat. A committee of permanent representatives serves as the liaison with the Secretariat, ministerial councils, and national secretariats were established within the ASEAN members' national governments.

The Secretariat provides administrative support to ASEAN. The Secretary General heads the Secretariat and is appointed for a non-renewable five year term. The nationality of the Secretary General also rotates based on alphabetical order of the members' names.

The Charter establishes that the Secretariat and Secretary General enjoy the usual privileges and immunities of working for a supra-national institution, like the Commission in the EU. However, unlike what the Treaty of Rome does for the European Commission, the Charter does not

assign any coercive authority to the Secretariat or the Secretary General.

LEGAL AGREEMENTS

With the Charter providing the overall legal foundation for ASEAN, several economic agreements serve as the legal foundation for regional economic integration:

- the ASEAN Trade in Goods Agreement (ATIGA) governs the ASEAN Free Trade Area for intra-ASEAN trade in goods;
- the ASEAN Comprehensive Investment Agreement (ACIA) governs intra-ASEAN investment; and
- the ASEAN Framework Agreement on Services (AFAS) governs intra-ASEAN trade in services.

These agreements are supplemented by several subsidiary agreements covering specific sectors, such as aviation and transport. They are also supported by a dispute resolution system called the

ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM).

ATIGA

Unlike the EU, ATIGA does not apply a common external tariff on imported goods. Each member may impose tariffs on goods entering from outside ASEAN based on its national schedules. However, for goods originating within ASEAN, members are to apply a tariff rate of zero to five percent (the more recent members of Cambodia, Laos, Myanmar and Vietnam were given until 2015 to implement the reduced tariff rates). This is known as the Common Effective Preferential Tariff (CEPT) scheme.

As of 2010, virtually all goods are covered by the CEPT. All duties on items covered by the so-called "inclusion" list of the ASEAN-six countries (Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand) have been eliminated. The remaining items on the so-called "exclusion" list consist mainly of sensitive items such as rice and sugar, with negotiations continuing for these products. ATIGA also eliminates tariff rate quotas and quantitative restrictions but does not prevent ASEAN members from imposing trade remedies (antidumping/countervailing duties and safeguard measures).

General exceptions to the CEPT are applied to products which an ASEAN member deems necessary for the protection of national security, public morals, the protection of human, animal or plant life and health, and protection of articles of artistic, historic, or archaeological value.

The CEPT only applies to goods originating within ASEAN. To qualify for ASEAN-origin, the general rule is that either (1) local ASEAN content must be at least 40% of the FOB value of the good or (2) the product has been subjected to processing so as to change the tariff classification at the four-digit

level of the customs classification code for the product (e.g., from plastic resin to plastic bags). The exporter must obtain a "Form D" certification from its national government attesting that the good has met the origin requirement. The Form D must be presented to the customs authority of the importing government to qualify for the CEPT rate.

ACIA

The ACIA covers all investments within ASEAN unless otherwise subject to member state reservation. This differs from previous agreements which applied only to investments for which the investor formally invoked the investment protection in writing and received approval by the host country. The ACIA provides the following benefits to individuals and corporate entities with ASEAN nationality:

- National treatment – all ASEAN investors are given treatment equal to that afforded to domestic investors.
- Most-favored nation treatment – preferential treatment granted by any member under any existing or future agreement must be extended to all other members.
- Performance requirements – investors shall not be required to meet export performance requirements.
- Senior management – members cannot mandate that senior management must be made up of any particular nationality.
- Transfers – members must allow free transfer of investment proceeds except for specified circumstances such as bankruptcy.
- Expropriation – members must follow appropriate procedures and provide compensation.
- Subrogation – members must recognize the subrogation of investment assets to other entities, such as with regard to insurance.
- Movement of persons – key personnel must be allowed entry and presence by the member government.
- Dispute resolution – the ACIA

establishes the rights of states and private investors to invoke dispute resolution.

Unlike the previous agreements, the ACIA applies to portfolio investments. The ACIA allows ASEAN members to deny corporate entities coverage by the ACIA if the entity's operations are insubstantial. It also contains the usual provisions for security and protection of morals. Members have already eliminated reservations in manufacturing, agriculture, fisheries, forestry and mining, and are discussing their reservations for other sectors.

AFAS

AFAS provides the broad guidelines for members to improve market access and ensure national treatment for services suppliers among ASEAN countries. Under the AFAS, members are required to apply the rules of the WTO General Agreement on Trade in Services. Since 1995, ASEAN members have approved agreements covering business services, environmental services, professional services, health care, construction, maritime transport, distribution, telecommunication, education and tourism. ASEAN members also have agreed to reduce restrictions on foreign equity investment in service sectors, a particularly sensitive issue. ASEAN members have signed agreements on financial services, although access in this sector is not as developed as in the above referenced sectors. ASEAN members have also signed agreements on the mutual recognition of professional qualifications in the engineering, nursing, architecture, surveying, medical, dental and accounting sectors.

EDSM

EDSM governs formal dispute resolution in ASEAN. The exception is investor-state dispute resolution under the ACIA, under which an investor which feels that its investment has been impaired may invoke dispute resolution directly against an ASEAN member state. ASEAN members may seek mediation and good offices consultations. If these efforts are ineffective, they may ask SEOM to establish a panel of independent arbitrators to review the dispute. Panel decisions can be appealed to an appellate body formed by the

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ASEAN Economic Community Council. Notably, only ASEAN members may invoke EDSM; investors and other non-state actors may not invoke EDSM.

ISSUES FACING INVESTORS IN THE AEC

Investors thinking about the AEC as a single market rather than as ten separate national markets should understand that the legal infrastructure of the AEC remains largely at the national level rather than at the regional level. The Charter, ATIGA, ACIA, AFAS and other core agreements are legally binding agreements, but except for the ACIA, these ASEAN agreements cannot be invoked by private actors on a cross-border or regional basis. For example, a Thai company exporting to Malaysia could not invoke the ATIGA against the Malaysian government through the EDSM or otherwise. It would face the choice of either convincing the Thai government to bring an EDSM complaint or bringing a domestic court action against the Malaysian government in Malaysia.

Yet EDSM has never been invoked in full because it still requires consensus to some extent to invoke the process, and ASEAN members are reluctant to have their disputes resolved before their peers. Hence they seek dispute resolution in other fora such as the WTO (such as in the recent Philippines-Thailand WTO disputes on tobacco and liquor). This can also be frustrating for companies affected by an AEC dispute, as they have no rights

to invoke dispute resolution yet their home ASEAN government may not be willing to invoke EDSM.

Issues related to the AEC can also arise because of inconsistent implementation by ASEAN members. Form D documents can be rejected, and ministries may not be aware of their AEC obligations and issue conflicting regulations, for example. Because ASEAN is still in the formation stage of the AEC, coordination is imperfect. An investor attempting to get an ASEAN-wide standard for its operations thus may have to pursue the matter at the ASEAN level with the Secretariat and various councils and at the national level. Identifying opportunities to interact with government officials at both levels is a priority, as is monitoring and implementing. Again, because the AEC is a work-in-process, such efforts will be time-consuming.

Yet the AEC integration process and the "ASEAN way" of consensus do work, if one is patient, as confirmed by the recent resolution of the dispute between Thailand and its partners over the ASEAN Industrial Cooperation

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(AICO) Scheme. Thailand had insisted on continuation of the scheme, even though the full implementation of ATIGA had rendered AICO redundant; Thailand had wanted to continue the application of import duties on automobiles through AICO. Eventually continued pressure from the other ASEAN members convinced Thailand to join the consensus and end AICO, without resorting to EDSM or other dispute resolution.

The AEC thus can benefit both investors and consumers who are prepared to deal with the ups and downs of creating a single market in Southeast Asia. This requires toning down expectations of Western legal norms and having great patience. Nevertheless, the rewards of investing in the region make it worthwhile. ■

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