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Improving connectivity between ASEAN's legal systems to address commercial issues

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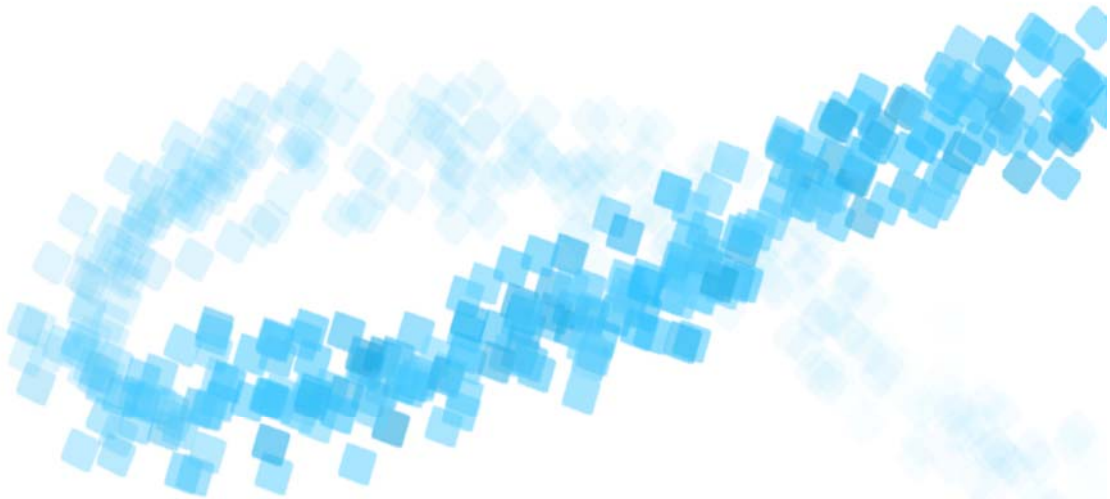
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Improving Connectivity between ASEAN's Legal Systems to Address Commercial Issues

**Interim Report
3 August 2017**



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TABLE OF CONTENTS

EXECUTIVE SUMMARY

SECTION 1 OBJECTIVES AND METHODOLOGY	1
---	----------

SECTION 2 CORPORATE BARRIERS	8
-------------------------------------	----------

SECTION 3 TRADE AND INVESTMENT BARRIERS	23
--	-----------

SECTION 4 LAND USE BARRIERS	47
------------------------------------	-----------

SECTION 5 DISPUTE SETTLEMENT BARRIERS	63
--	-----------

SECTION 6 SUMMARY OF KEY INTERIM FINDINGS AND PRELIMINARY RECOMMENDATIONS	70
--	-----------

- Corporate Barriers
- Trade and Investment Barriers
- Land Use Barriers
- Dispute Settlement Barriers
- Information Barriers

LIST OF CHARTS AND TABLES	76
----------------------------------	-----------

RESEARCH TEAM MEMBERS	77
------------------------------	-----------

ACKNOWLEDGEMENTS	78
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EXECUTIVE SUMMARY

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This interim report on legal barriers to doing business in ASEAN coincides with the 50th Anniversary of ASEAN's founding and the first year of the ASEAN Economic Community (AEC). The team is privileged to be supported by, among others, the Canada-ASEAN Business Council (CABC), given that it is also the 40th anniversary of dialogue relations between Canada and ASEAN.

Despite occasional misgivings about the "ASEAN Way", ASEAN economic integration has come a very long way. The number of member States has grown over the 50 years since ASEAN's founding, and the joint efforts among these States driving economic growth and integration in the region have been notable.¹ Laws have changed, new institutions and processes have sprung up. Guided by blueprints and action plans, ASEAN is moving increasingly towards being a rules-based economic group.

As global uncertainties continue to grow, ASEAN has an important role in unlocking more economic opportunities for its businesses and its citizens. One area where this objective can be advanced is through addressing legal barriers which contribute to business costs in ASEAN.

This study, due to be fully completed in the second quarter of 2018, examines business concerns through a legal lens, to identify key legal barriers to trade and investment in ASEAN. Research is being carried out in four main areas:

- Corporate laws;
- Trade and investment laws;
- Land Laws; and
- Dispute settlement laws and processes.

This interim report records a number of key common themes which have surfaced, including the complexity and number of laws, uncertainty of laws, implementation of existing laws and regional agreements and access to legal information. Such issues can contribute to increased business costs and possibly deter or delay business activity. The aim is for the recommendations in this report to be considered by policy-makers to further improve the business laws and processes in ASEAN.

The team's key interim findings and preliminary recommendations are found in **Section 6** of this Interim Report.

¹ According to the *Global Enabling Trade Report 2016*, ASEAN is now "more accessible" for trading goods than Europe and the US: see <http://reports.weforum.org/global-enabling-trade-report-2016/press-releases/>. The Report uses the Enabling Trade Index, and assesses the performance of 136 economies on "domestic and foreign market access; border administration; transport and digital infrastructure; transport services; and operating environment".

This interim report describes research in progress by the authors and is made available to elicit comments, discussions and debate. The authors hope that their recommendations will be useful to policy-makers and businesses in ASEAN. The authors request that readers do not quote from, cite or reproduce this interim report without their prior written permission.

The authors would like to acknowledge the support for their research from the Singapore Ministry of Education (MOE) Academic Research Fund (AcRF) Tier 1 grant (Grant Number: 15-C234-SMU-001).

SECTION 1 OBJECTIVES OF RESEARCH PROJECT AND METHODOLOGY

Objectives in relation to ASEAN Integration

The establishment of the ASEAN Economic Community (AEC) in December 2015 and the celebration of the 50th anniversary of ASEAN's founding in 2017 provided compelling reasons to embark on this research project in 2016. As the AEC moves forward with trade-friendly objectives such as trade facilitation and harmonisation of rules, the project seeks to complement these objectives by examining key legal barriers faced by businesses which trade and invest in ASEAN countries. The study's recommendations are aimed at providing useful new insights to ASEAN policy-makers, to help them further improve business-related laws and policies for the business community.

The **AEC Blueprint 2007** set out four main goals: (1) creating a single market and production base with a free flow of goods, services and skilled labour and a freer flow of capital; (2) developing a competitive region with clear competition policies; (3) promoting equitable economic development; and (4) developing a region integrated into global networks.² Updating and building on the above, the **AEC Blueprint 2025** sets out the following aims: (i) A Highly Integrated and Cohesive Economy; (ii) A Competitive, Innovative, and Dynamic ASEAN; (iii) Enhanced Connectivity and Sectoral Cooperation; (iv) A Resilient, Inclusive, People-Oriented, and People-Centred ASEAN; and (v) A Global ASEAN.³

The success of a single market and production base is however dependent on strong connectivity – including legal connectivity – in ASEAN. The legal systems of the member States are diverse, have developed along different lines and are shaped by different political forces. The aspiration of a single market must therefore be accompanied by a consideration of the legal and regulatory frameworks in the region and how they may best support the aims of the AEC. Addressing key legal barriers can therefore play an important role in reducing business costs and encouraging more trade.

Laws and their application are seen to be important factors in helping to reduce transaction costs for businesses in ASEAN, as the following list illustrates:

- Stability of government policies;
- Consistency of laws and regulations;
- Consistency of judicial decisions; and
- Addressing corruption and the additional costs it imposes on investors.⁴

² ASEAN Economic Blueprint 2007; asean.org/wp-content/uploads/archive/5187-10.pdf (accessed on 23 July 2017).

³ astnet.asean.org/docs/AEC-Blueprint-2025-FINAL.pdf (accessed on 23 July 2017).

⁴ Feedback from a business participant at a Roundtable discussion held as part of the team's research. The participant also shared that very often, it is what is *not written* in the law or regulations that may be more serious barriers.

The regulatory framework that governs businesses in a country is an integral part of the country's business or investment climate. Studies have generally shown a correlation between regulation on the one hand, and entrepreneurship and investment on the other. A reduction in the costs of setting up businesses has been linked with a general increase in the creation of new businesses⁵ and foreign investments.⁶

There is already much other work done in this area.⁷ Other studies have raised the matter of transaction costs to businesses resulting from factors such as legal barriers, diverse legal rules, slow implementation of legal obligations, or a lack of clear laws.⁸ As the sidebar indicates, some of these concerns apply in the wider Asia-Pacific context, and not just within ASEAN.

The present study builds on such work, taking a legal perspective to identify key legal barriers, to provide a number of preliminary recommendations.⁹

APEC CEO SURVEY

The following shows the top *law-related* areas of considerations to the question posed to APEC CEOs: "What matters most in your business decisions to invest in APEC economies outside of your principal APEC economy?"

No. 1: 55% - Regulatory environment (transparent rules, lack of corruption)
No. 4: 43% - Land rights and contracts protection

⁵ Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, "The Regulation of Entry", (2002) 117 *The Quarterly Journal of Economics* 1-37; Alberto Alesina, Silvia Ardagna, Giuseppe Nicoletti & Fabio Schiantarelli, "Regulation and Investment", (2005) 3 *Journal of the European Economic Association* 791-825; Leora Klapper, Luc Laeven & Raghuram Rajan, "Entry Regulation as a Barrier to Entrepreneurship", (2006) 82 *Journal of Financial Economics*, 591-629; Miriam Bruhn, "License to Sell: the Effect of Business Registration Reform on Entrepreneurial Activity in Mexico", (2011) 93 *The Review of Economics and Statistics*, 382-386; Raian Divanbeigi & Rita Ramalho, "Business Regulations and Growth", Policy Research Working Paper, No. WPS 7299 (2015). Washington, D.C.: World Bank Group. <http://documents.worldbank.org/curated/en/694641468188652385/Business-regulations-and-growth> (accessed on 22 July 2017).

⁶ Jonathan Munemo, "Business Start-up Regulations and the Complementarity between Foreign and Domestic Investment" (2014) 150 *Rev World Econ*, 745-761; Adrian Corcoran & Robert Gillanders, "Foreign Direct Investment and the Ease of Doing Business", (2015) 151 *Rev World Econ* 103-126.

⁷ These include starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, enforcing contracts and resolving insolvency; see World Bank, at: <http://www.doingbusiness.org/reports/global-reports/doing-business-2017> (accessed on 20 July 2017). In particular, the World Bank has created an 'ease of doing business' index, based on a number of sub-indices, which is used to rank 190 economies worldwide. The findings are published in annual reports, the most recent of which is, *Doing Business 2017: Equal Opportunity for All*, current as of June 1, 2016. *Doing Business* is based on laws and regulations that affect the business environment, and relies on local experts, including lawyers, business consultants, accountants, government officials and other professionals who routinely administer or advise on legal and regulatory requirements, for much of the data. Countries generally wish to improve their rankings in the World Bank Rankings.

⁸ See for example, the indicators of trade and investment barriers at World Bank, <http://tcd360.worldbank.org/topics> (accessed on 23 July 2017).

⁹ This research is supported by the Singapore Ministry of Education (MOE) Academic Research Fund (AcRF) Tier 1 grant (Grant Number: 15-C234-SMU-001).

Methodology

The study draws on a number of sources of research materials, including the following:

- An online survey of businesses operating in the ASEAN region, conducted by the research team;¹⁰
- Existing literature and research materials;
- Survey materials of regional and international organisations;
- Feedback received during Roundtable discussions held by the team in a number of ASEAN cities;
- Economic and regional commentaries.

The findings and recommendations in this interim report are preliminary in that there is further work to be done to confirm the findings, refine the preliminary recommendations and to address related issues arising from the research material.

Identification of Key Legal Barriers

This study examines primarily legal barriers, namely, barriers which arise because of legal restrictions in laws and regulations, legal ambiguities, burdensome legal requirements, or a lack of laws or clear procedures. While it will mention non-legal obstacles where relevant, these are not the focus. Other barriers - such as time and cost barriers - are measures in other extensive studies.¹¹

The study examines legal barriers in four major areas:

- Corporate and “doing business” barriers such as registration, compliance and related legal requirements;
- Trade and investment barriers;
- Land use barriers;
- Dispute settlement issues.

For each area, the study examines the sources consulted and proposes a number of preliminary recommendations in the hope that they aid regional policy-makers in law-making and implementation, to advance the objectives of the AEC.

The team has also identified a number of gaps in legal information, which can present obstacles to businesses. It provides recommendations to deal with such gaps. While

¹⁰ The data collected was anonymised and aggregated unless respondents chose to indicate a preference otherwise. The team is grateful to the Canada-ASEAN Business Council - particularly Mr Wayne Farmer and Mr Greg Ross (and Dr Shawn Watson, Mr Ross' predecessor at the CAB), Mr Vincent Dwyer of Norton Rose Fulbright LLP and Tractus Asia Ltd for their kind assistance in reaching out to potential respondents. As the number of respondents who fully completed the online survey was below 30, the team decided to use the survey results primarily as confirmation of other research findings.

¹¹ See for example, World Bank, “Trading Across Borders”, at <http://www.doingbusiness.org/data/exploretopics/trading-across-borders>. See also “Doing Business 2017”, <http://www.doingbusiness.org/reports/global-reports/doing-business-2017> (accessed on 23 July 2017).

these are not strictly “legal barriers”, the gaps in information on commercial laws and processes in ASEAN member States can add to business uncertainty and costs.

This study aims to depart from many others in two main ways:

- While viewing issues through a legal lens, legal and non-legal sources are consulted;
- Feedback is sought from the business community where possible, to identify/confirm priority obstacles faced by businesses in the region.

Given that the study cannot by its nature be exhaustive, the objective is to draw attention to business views on *priority* legal obstacles and to inject fresh thinking into the policy-making process where possible.

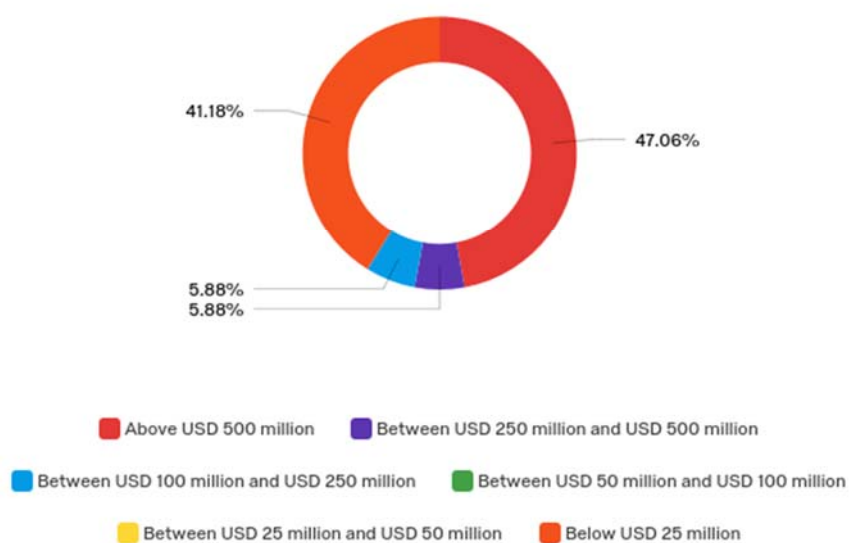
Online Survey – Information about Respondents

Profile of Respondents

Generally, the questions required selection from a menu of responses, while some questions provided scope for follow-up qualitative answers. Responses were anonymised and/or aggregated.

As Chart 1 shows, the online survey drew responses from businesses with an annual turnover ranging from below USD25 million to above USD500 million.

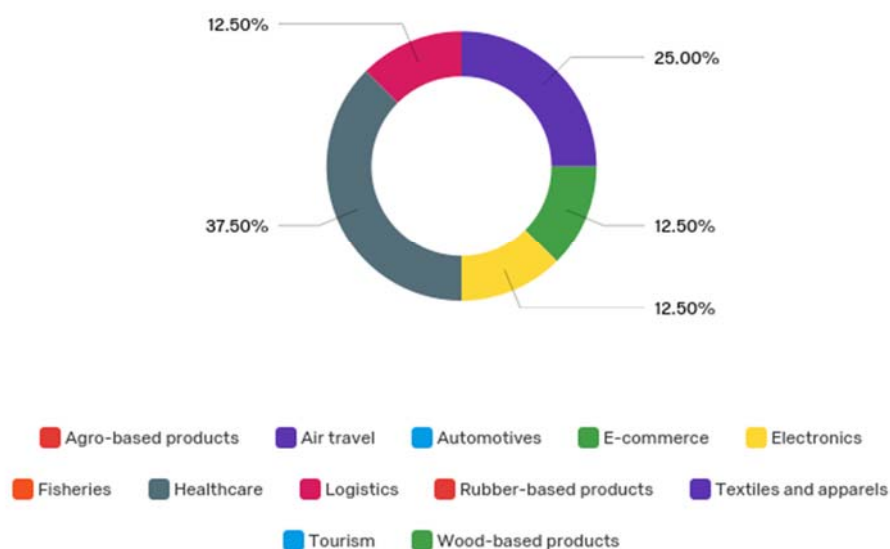
Chart 1: Profile of Businesses which Completed Survey



Source: Online survey by the team.

Chart 2 shows the proportion of respondents representing ASEAN's 12 Priority Integration Sectors.¹²

Chart 2: Proportion of Respondents in ASEAN's 12 Priority Integration Sectors

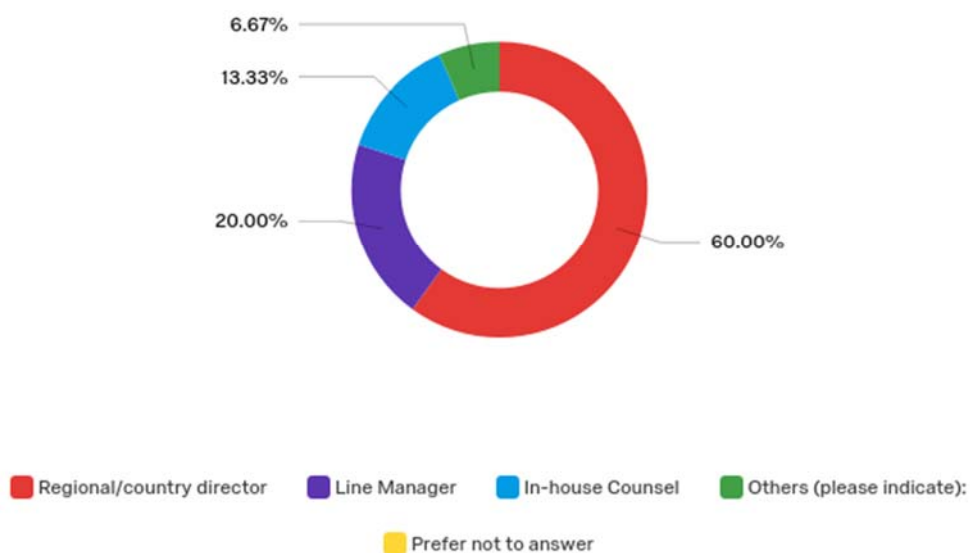


Source: Online survey by the team.

¹² See also Section 3 of this interim report.

A majority of respondents answering the questionnaire were regional or country directors and line managers, as shown in Chart 3.

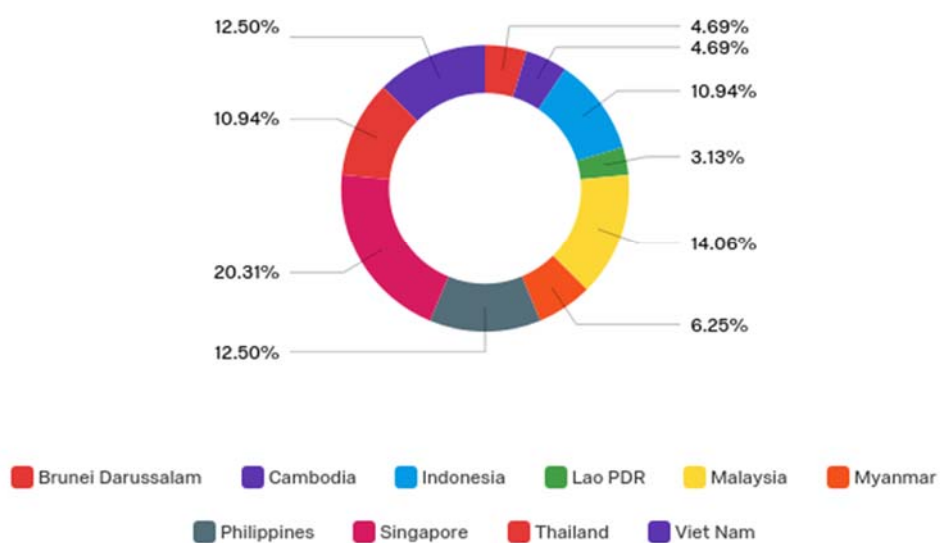
Chart 3: Company Function/Designation of Respondents



Source: Online survey by the team.

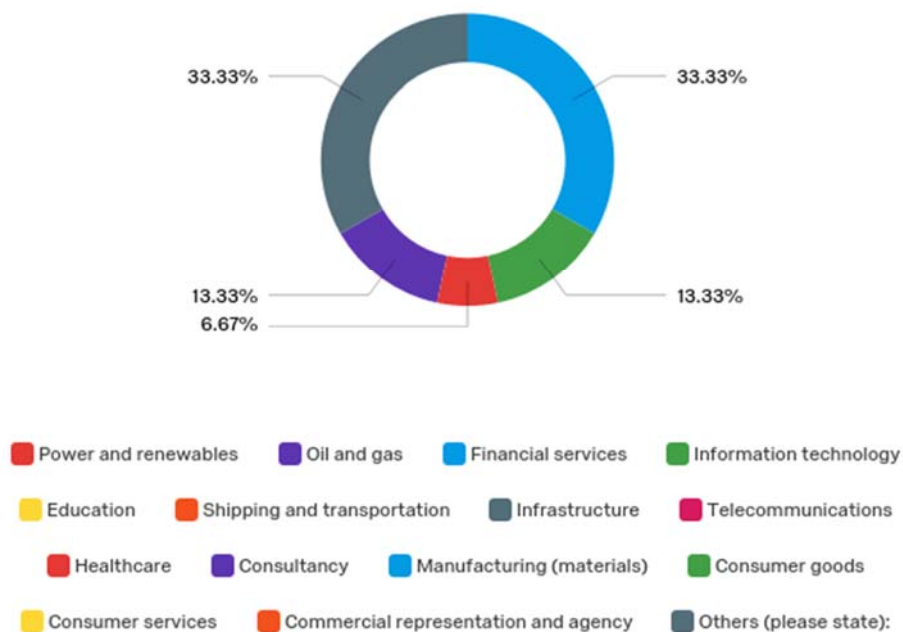
The following chart shows the countries in which the respondent entities had investments.

Chart 4: Countries in which Respondents had Investments



Source: Online survey by the team.

Chart 5: Sectors which Respondents Represented



Source: Online survey by the team.

Roundtable Discussions

In addition to the survey, the team has organised three Roundtable Discussions to date, in Manila, Bangkok and Ho Chi Minh City, to gather feedback from business and academic parties on legal barriers encountered in ASEAN.¹³ The team had the privilege of being hosted at three prominent law schools in these cities, whose academic teams helpfully gathered practitioners, academics, regulators and business representatives for the discussions.

Ongoing Research

Due to the large amount of material, not all data and literature could be examined in this interim report.

The full study is expected to be completed by the second quarter of 2018 and to culminate in a final publication. The team will continue to conduct research on legal barriers in preparation for the final report, including the possibility of further Roundtables in other ASEAN cities.

¹³ The team is very grateful to the following law schools which helped to organise the Roundtables in their respective cities: School of Law, Ateneo de Manila University; Faculty of Law, University of the Thai Chamber of Commerce, and International Law Faculty, Ho Chi Minh City University of Law.

SECTION 2 CORPORATE BARRIERS

Business Set-up and Continuing Obligations

A supportive business environment is essential for boosting investment and growth. Investors have to abide by regulations that govern the setting up of businesses. The administrative burdens and regulatory costs associated with business set-up have to be borne by investing parties, and necessarily contribute to the overall cost of investment. Reducing such costs should therefore improve a country's overall attractiveness for investors. This correlation has been repeatedly supported by a number of empirical studies.¹⁴ Additionally, in the context of this project, the AEC is dependent on better integration and connectivity within ASEAN. To this end, ASEAN leaders had adopted the Master Plan on ASEAN Connectivity 2025 in September 2016.¹⁵ The costs of doing business will be higher if business regulation is fragmented across ASEAN. Harmonising these regulatory regimes across ASEAN is thus an important step forward, encouraging more trade and investment in the region.

ASEAN Work Programme on Starting of Businesses

The ASEAN Coordinating Committee on Micro, Small and Medium Enterprises (MSMEs) recently developed and published a Work Programme on Starting a Business.¹⁶ The report examines the business start-up processes of each ASEAN member State, and drawing upon the work of the World Bank as well as the Economic Research Institute for ASEAN and East Asia.¹⁷ It notes that there is significant difference amongst the extant processes across the ASEAN member States. A divergence is also observed between the ASEAN-6 countries (i.e., Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand), and Cambodia, Lao PDR,

¹⁴ Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, "The Regulation of Entry", (2002) 117 *The Quarterly Journal of Economics* 1-37; Alberto Alesina, Silvia Ardagna, Giuseppe Nicoletti & Fabio Schiantarelli, "Regulation and Investment", (2005) 3 *Journal of the European Economic Association* 791-825; Leora Klapper, Luc Laeven & Raghuram Rajan, "Entry Regulation as a Barrier to Entrepreneurship", (2006) 82 *Journal of Financial Economics*, 591-629; Miriam Bruhn, "License to Sell: the Effect of Business Registration Reform on Entrepreneurial Activity in Mexico", (2011) 93 *The Review of Economics and Statistics*, 382-386; Jamal Ibrahim Haidar, "The impact of business regulatory reforms on economic growth", (2012) 26 *Journal of the Japanese and International Economies* 285-307; Raian Divanbeigi & Rita Ramalho, "Business Regulations and Growth", Policy Research Working Paper, No. WPS 7299 (2015). Washington, D.C.: World Bank Group. <http://documents.worldbank.org/curated/en/694641468188652385/Business-regulations-and-growth> (accessed 22 July 2017); Jonathan Munemo, "Business Start-up Regulations and the Complementarity between Foreign and Domestic Investment" (2014) 150 *Rev World Econ* 745-761; Adrian Corcoran & Robert Gillanders, "Foreign Direct Investment and the Ease of Doing Business", (2015) 151 *Rev World Econ* 103-126; Klimis Vogiatzoglou, "Ease of Doing Business and FDI Inflows in ASEAN" (2016) 33 *Journal of Southeast Asian Economies* 343-363.

¹⁵ <http://asean.org/asean-leaders-adopt-master-plan-on-connectivity-2025/> (accessed 22 July 2017).

¹⁶ <http://asean.org/storage/2017/02/64.-December-2016-ASEAN-Work-Programme-on-Starting-a-Business.pdf> (accessed 22 July 2017).

¹⁷ <http://www.eria.org/RPR-FY2012-8.pdf> (accessed 22 July 2017). This study focused on small and medium enterprises.

Myanmar and Viet Nam (the CLMV countries). The report identifies three areas that, if improved, will reduce the start-up burden for businesses: restrictive regulations; complex procedures, and third-party involvement.¹⁸ These areas thus form the components of the Work Programme, to be implemented as part of the ASEAN Strategic Action Plan on SME Development.

Survey Findings

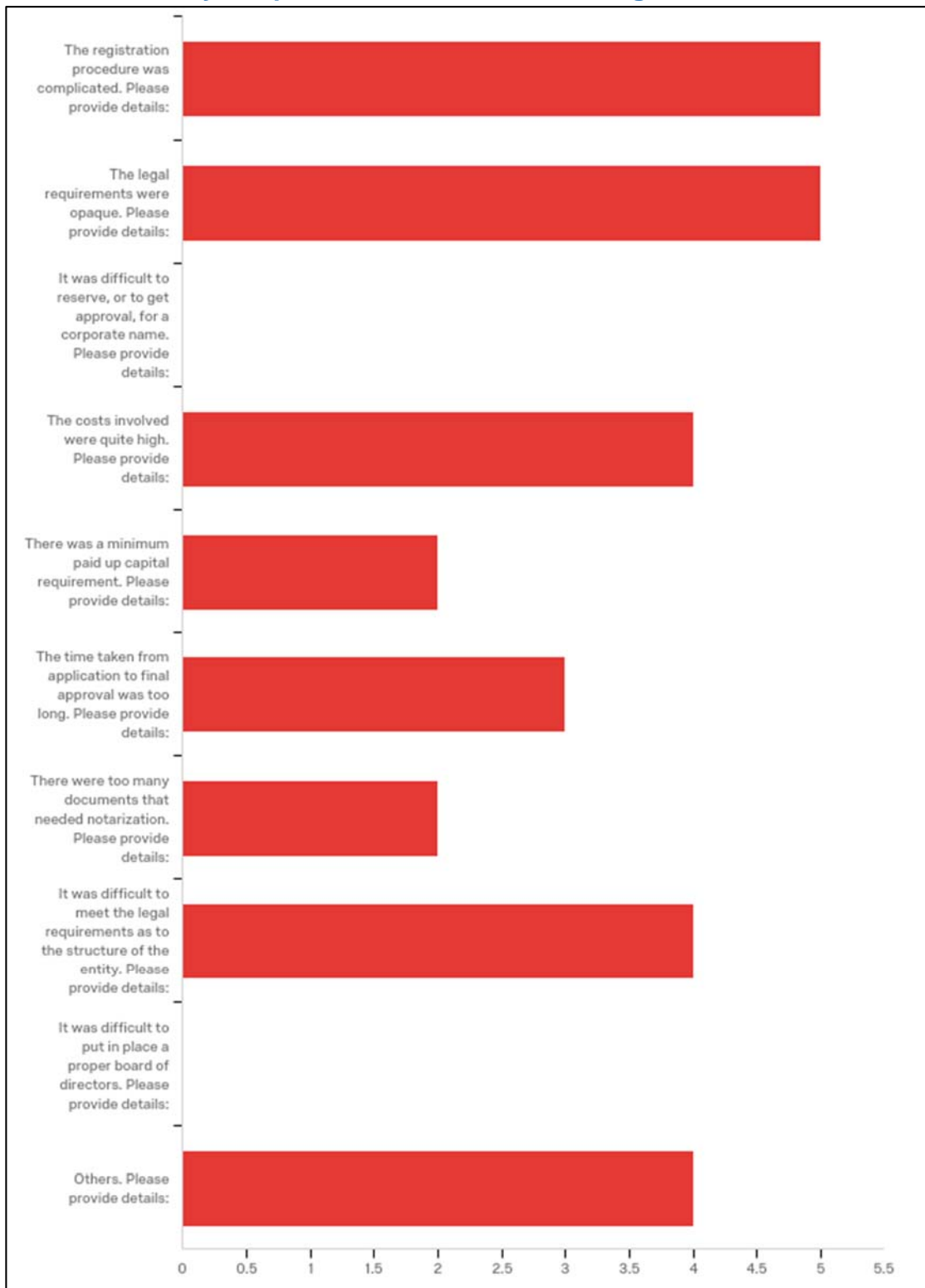
The survey asked business respondents a number of questions related to business set-up, as well as compliance costs.

Set-up Issues

The survey asked the respondents to provide information specifically on whether, in setting up their businesses within ASEAN, there was any aspect of the process that made compliance with the legal requirements cumbersome or difficult when compared to the requirements of the respondent's home country. The survey provided a number of possible difficulties as options. The response rate for each of these difficulties is indicated below (Chart 6).

¹⁸ This refers to the involvement of third parties such as notaries and lawyers. Indeed, the costs of engaging lawyers in order to set up a company was flagged by one respondent to the team's survey.

Chart 6: Survey Responses to Obstacles in Doing Business in ASEAN



The survey also asked respondents to provide details of the specific obstacles that they had indicated as having encountered (Table 1).

Table 1 – Survey Responses on Obstacles to Business Set-up

Obstacle	Detailed response
(a) Complexity of registration procedure	<p>“Myanmar was time consuming and cumbersome.”</p> <p>“Local language legal documents only.”</p> <p>“Creating a company in Vietnam is incredible complex with regulatory hurdles. This was enough to prevent us from opening an office there.”</p> <p>“Too many processes.”</p>
(b) Legal requirements are opaque	<p>“Myanmar had limited clarity of requirements.”</p> <p>“Many terms are vague.”</p> <p>“Contradictory rules from regulatory bodies.”</p>
(c) High costs	<p>“Many law firms tend to overcharge foreign companies for incorporation and shareholders agreement.”</p> <p>“Company registration fees, minimum capital requirements, restrictions on foreign ownerships.”</p>
(d) Minimum paid up requirement	<p>“In Indonesia and Vietnam, a minimum paid up capital is required for any company.”</p> <p>“Was a challenge in the Philippines with the 60/40 rule.”</p> <p>“Indonesia requires a minimum paid up capital for any foreign-owned company.”</p>
(e) Lengthy time taken	<p>“Myanmar was time consuming.”</p> <p>“On client company establishments in Myanmar, the process can take more than 6 months.”</p> <p>“Vietnam I had a six month waiting period.”</p>

The survey responses are generally consistent with what other researchers have found in relation to the business set up processes in the different ASEAN countries.

The possible obstacles to investment may be generally categorised into the following broad areas.

(i) Complicated Administrative Procedures for Business Set-up

The procedural requirements for business set-up in some ASEAN member States can be difficult to manoeuvre. Procedural complexity affects the total time that must be invested before a business is set up, and this in turn translates into increased costs. The following table shows the rankings of ASEAN countries for “Starting a Business” in the World Bank’s Ease of Doing Business Report.¹⁹ It should be noted that these rankings are based on factors beyond merely setting up a company, such as other licensing requirements. These other requirements are beyond the scope of this section.

Table 2: World Bank’s Ranking for Starting a Business for ASEAN member States

Economy	Rank
Singapore	6
Malaysia	23
Thailand	46
Viet Nam	82
Brunei Darussalam	84
Indonesia	91
Philippines	99
Lao PDR	139
Myanmar	146
Cambodia	180

With the exception of Viet Nam, the member States specifically identified by the team’s respondents as having complex processes for business set-up fall in the lower half of the table. In particular, the process for business set-up in Myanmar appears particularly vexing. Although Myanmar’s government has removed many restrictions on businesses to improve the business environment, many of these reforms appear to be focused on fiscal incentives, and on the liberalisation of trade and investment. The Foreign Investment Law (2012), for example, which is widely regarded as a significant step for Myanmar, gives foreign investors additional tax incentives, more clearly defined lists of restricted sectors, and other benefits. The *procedural* aspects of the investment process, however, appear to require more attention.²⁰ Kyi²¹ has

¹⁹ <http://www.doingbusiness.org/rankings> (accessed on 4 July 2017).

²⁰ See also Section 3 on Investment Liberalisation.

²¹ Thin Thin Kyi, “Foreign Direct Investment in Myanmar. Burma/Myanmar in Transition: Connectivity, Changes and Challenges”, International Conference on Burma/Myanmar Studies Burma/Myanmar in Transition: Connectivity, Changes and Challenges, Chiang Mai University, Thailand, 24-25 July 2015, University Academic Service Centre, available at http://www.burmalibrary.org/docs21/Economic%20Development/Thin-Thin-Kyi-2015-Foreign_Direct_Investment_in_Myanmar-en.pdf (accessed 23 July 2017).

noted that to get the approval to start a business, not only are there numerous different stages and agencies²² from which to obtain approval, there is a lack of transparency as to the decision-making process. Whilst a survey respondent indicated a time frame of 6 months for approval, the World Bank's Doing Business report estimated that obtaining the approval to start a business in Myanmar required 13 days in order to complete 11 procedures. It may well be that generalisations are neither accurate nor reflective of every investor's experience. As Bissinger and Maung note, '[t]he extremes encountered in this research ranged from obtaining a license on the same day to being unable to obtain a license after more than 5 years'.²³

The survey respondents also singled out Viet Nam's regulatory regime for business start-up as particularly complex. In fact, many pro-investor reforms have been introduced in Viet Nam since 2005.²⁴ Indeed, Viet Nam has improved significantly in the World Bank's Ease of Doing Business rankings between 2011 and 2016.²⁵ However, the improvement in rankings was due to three specific reforms that Viet Nam had implemented in the areas of protecting minority investors, paying taxes and trading across borders.²⁶ Procedurally, the actual process of starting a business, according to the World Bank Report, still required 9 procedures taking a period of 24 days. This may explain the survey responses.

Additionally, the survey responses are consistent with the views gathered at the Ho Chi Minh City Roundtable. Generally, participants there affirmed that setting up a new company in Viet Nam is too 'time-consuming' as it takes about three months to prepare all the legal documents for setting up the business and the investor must find a good landlord to lease the premises as the registered office. It was therefore suggested that a better alternative would be the acquisition of an existing Vietnamese company.

(ii) Administrative Uncertainties

This is a separate issue from the actual procedural requirements stipulated in the respective regulatory instruments, albeit closely linked. The greater the procedural complexity, requiring the involvement of more agencies, the more room there is for increased bureaucracy and red tape. This not only increases the uncertainty of the application outcomes, but also the time and costs involved.

²² The power to grant operating licenses to businesses in Myanmar is spread across a wide range of authorities, in various union ministries and Development Affairs Organisations.

²³ Jared Bissinger & Linn Maung Maung, "Subnational Governments and Business in Myanmar", Subnational Governance in Myanmar Discussion Paper Series, The Myanmar Development Resource Institute's Centre for Economic and Social Development (MDRI-CESD) and The Asia Foundation (2014), available at <https://asiafoundation.org/resources/pdfs/SubnationalGovernmentsandBusinessinMyanmarEnglish.pdf> (accessed 4 July 2017).

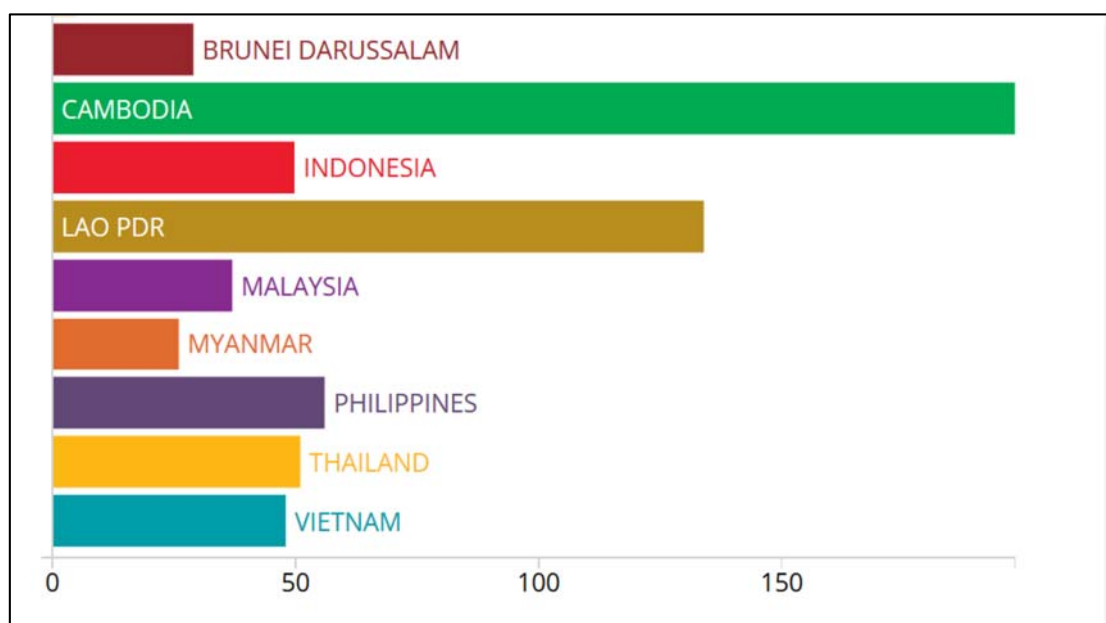
²⁴ <http://asean.org/storage/2017/02/64.-December-2016-ASEAN-Work-Programme-on-Starting-a-Business.pdf> (accessed 22 July 2017).

²⁵ Viet Nam moved up 9 places: <http://www.doingbusiness.org/data/exploreconomies/vietnam> (accessed 4 July 2017).

²⁶ <http://www.doingbusiness.org/reforms/overview/economy/Vietnam> (accessed 4 July 2017).

The chart below shows that the time taken to start a business varies across the member States.

Chart 7: ASEAN: Time to Start a Business (days)



Source: World Bank (2016 data)

Many ASEAN member States have streamlined their business start-up processes by implementing electronic systems. The adoption of relevant electronic systems for the purposes of business start-up is however not uniform across ASEAN.

Table 3: Availability of Electronic Options in Incorporation

<i>Economy</i>	Electronic database for name searches	Availability for forms online	of Online submission of documents
<i>Brunei Darussalam</i>	✓	✓	✓
<i>Cambodia</i> ²⁷	✓	✓	✓
<i>Indonesia</i>	✓	✓ ²⁸	✗
<i>Lao PDR</i>	✗	✓ ²⁹	✗

²⁷ <https://efiling.drcor.mcit.gov.cy/DrcorPublic/Default.aspx> (accessed 22 July 2017).

²⁸ <http://www5.bkpm.go.id/> (accessed on 22 July 2017).

²⁹ A standard form of the corporate constitution as well as certain forms are available for download from the Ministry of Planning and Investment website: <http://www.investlaos.gov.la/index.php/resources/application-forms> (accessed 22 July 2017).

Malaysia	✓	✓ ³⁰	?
Myanmar	✓	✓	✗
Philippines ³²	✓	✓	✗
Singapore	✓	✓	✓
Thailand	✓	✗ ³³	✗ ³⁴
Viet Nam ³⁵	✗	✗	✗

Source: Compiled from a variety of sources, but subject to further verification.

(iii) Restrictions on Foreign Participation

The survey respondents were also asked whether they had a preferred type of business structure. Whilst most were satisfied with the existing available corporate structure, there was a distinct preference for the availability of a wholly foreign-owned company. Foreign investment restrictions vary across the ASEAN member States (Table 4).³⁶

Table 4: Foreign Equity Policies

Foreign Equity Policies	
BRUNEI DARUSALAM	There is no restriction on total foreign ownership of companies incorporated in Brunei. The Companies Act requires at least one of the two directors—or if more than two directors, at least two of them—to be ordinarily resident in Brunei.
CAMBODIA	There is no sector closed only to foreign investment, ³⁷ and wholly-foreign owned companies are permitted in most sectors. In a few

³⁰ <https://www.ssm.com.my/en/form-public> (accessed 22 July 2017).

³¹ Whilst there appears to be an e-lodgement page (see <http://www.ssm.com.my/en/product-services/e-lodgement>) (accessed 22 July 2017), the information here (<https://www.ssm.com.my/en/product-services/1-day-company-incorporation>) (accessed 22 July 2017) suggests that documents have to be physically filed with the Companies Commission of Malaysia.

³² <http://www.sec.gov.ph/online-services/> (accessed 22 July 2017).

³³ Although the website of the Department of Business Development, Ministry of Commerce suggests that forms are available for download: http://www.dbd.go.th/dbdweb_en/ewt_news.php?nid=3973&filename=index (accessed 22 July 2017).

³⁴ The website of the Department of Business Development, Ministry of Commerce suggests that this is possible: http://www.dbd.go.th/dbdweb_en/ewt_news.php?nid=3966&filename=index (accessed 22 July 2017). During the team's Bangkok Roundtable, a representative from the Department of Business Development, Ministry of Commerce indicated that an online platform for the setting up of businesses will be in operation by 2017.

³⁵ There is an online portal for business registration: <https://dangkykinhdoanh.gov.vn/en-gb/home.aspx> (accessed 22 July 2017).

³⁶ See also Section 3 on Investment Liberalisation.

³⁷ See generally the Law on Investment of the Kingdom of Cambodia 1994 and the Law on the Amendment to the Law on Investment 2003, available at <http://www.cambodiainvestment.gov.kh/law-on-investment-august-05-1994-and-law-on-the->

	sectors, such as cigarette manufacturing, movie production, rice milling, gemstone mining and processing, publishing and printing, radio and television, wood and stone carving production, and silk weaving, foreign investment is subject to local equity participation or prior authorisation from authorities. ³⁸
INDONESIA	<p>IDR 2.5 billion [approx. USD 190,000]³⁹</p> <p>There are restrictions on foreign investment set out in the 2016 Negative Investment List (Daftar Negatif Investasi) as issued under Presidential Regulation No. 44 of 2016 Concerning Lists of Business Fields That Are Closed To and Business Fields That Are Open with Conditions to Investment.⁴⁰</p> <p>Some restrictions under the Restricted Business Fields category include restrictions on foreign capital ownership to 49% for certain agricultural related fields,⁴¹ divestment obligations for mineral and coal mining businesses and specific licensing requirements.⁴²</p>
LAO PDR	<p>100% foreign equity ownership is allowed in all sectors open to foreign investment except where the government deems the investment to be detrimental to national security, health or national traditions, or to have a negative impact on the natural environment.⁴³</p> <p>The Investment Promotion Department of the Ministry of Planning and Investment provides information on the conditions for foreign investment on its official website.⁴⁴</p>
MALAYSIA	Malaysia has removed its all-round foreign equity ceiling of 70%. However, it appears that despite this, foreign equity restrictions remain in certain sectors. These are imposed by the different Ministries and government agencies, rather than by a central body.

[amendment-to-the-law-on-investment_030324.html](#) (accessed 22 July 2017); see also <http://www.cambodiainvestment.gov.kh/investment-scheme/limitation-on-foreign-investment.html> (accessed 22 July 2017).

³⁸ <https://www.export.gov/article?id=Cambodia-openness-to-foreign-investment> (accessed 22 July 2017).

³⁹ <https://dentons.rodyk.com/en/insights/alerts/2017/july/17/foreign-investment-in-indonesia>. (accessed 22 July 2017). This applies specifically to foreign investment companies, or PT PMA.
⁴⁰ http://www5.bkpm.go.id/images/uploads/prosedur_investasi/file_upload/REGULATION-OF-THE-PRESIDENT-OF-THE-REPUBLIC-OF-INDONESIA-NUMBER-44-YEAR-2016.pdf (accessed 22 July 2017).

⁴¹ Appendix III of the Presidential Regulation No. 44 of 2016.

⁴² Ch 3 of the Presidential Regulation No. 44 of 2016.

⁴³ <https://www.export.gov/article?id=Lao-Openness-to-Foreign-Investment> (accessed 22 July 2017).

⁴⁴ <http://www.investlaos.gov.la/index.php/start-up/general-investment?start=1> (accessed 22 July 2017).

	<p>There are 147 local authorities in Malaysia,⁴⁵ which may impose equity restrictions as a condition to obtain a license.⁴⁶</p> <p>A separate set of regulations is imposed to reserve equity in businesses for ethnic Malays or <i>Bumiputera</i>. The percentage of equity participation has been placed at 23%,⁴⁷ although the position does not appear to be clear.</p> <p>Areas which are subject <i>Bumiputera</i> reservations include banking and finance, water, <i>batik</i> production, agriculture, defense, energy and telecommunications.</p>
<p>MYANMAR</p>	<p>USD 50,000 (service industries) USD 150,000 (manufacturing)⁴⁸</p> <p>The Myanmar Companies Act 1914⁴⁹ distinguishes between Myanmar companies and foreign companies. Currently, a ‘Burmese company’ is defined in s 2A to mean ‘a company whose entire share capital is, at all times, owned and controlled by the citizens of the Union of Burma’. A ‘foreign company’ is correspondingly defined as ‘any company other than a Burmese company’.⁵⁰</p> <p>A new Companies Law⁵¹ is being prepared. In this legislation, the ownership threshold and effect is very different. Foreign investors will be permitted to obtain an ownership interest in a Myanmar company up to a certain threshold before the company will be considered a foreign company, with the threshold expected to be 35%.⁵²</p> <p>The new law will also require at least one resident director.</p>
<p>PHILIPPINES</p>	<p>PHP 5000 requirement⁵³</p>

⁴⁵ <http://www.mida.gov.my/home/methods-of-conducting-business-in-malaysia/posts/> (accessed 22 July 2017).

⁴⁶ Siew Yean Tham, “The AEC and Domestic Challenges in Malaysia: Examining the Liberalization of Services in AFAS”, (2015) 32 *Journal of Southeast Asian Economies* 202-219.

⁴⁷ <https://www.state.gov/e/eb/rls/othr/ics/2013/204686.htm> (accessed on 22 July 2017).

⁴⁸ http://www.dica.gov.mm/sites/dica.gov.mm/files/news-files/how_to_register_company_handbook_en.pdf (accessed 22 July 2017).

⁴⁹ http://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/myanamr_companies_act_1914.pdf (accessed 22 July 2017).

⁵⁰ Section 2B of the Burma Companies Act 1914.

⁵¹ http://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/mcl_english_version_june_2017_abc_comments_clean.pdf (accessed 22 July 2017).

⁵² [http://www.blplaw.com/media/how-can-we-help-you/commercial/Myanmar_Companies_Law_Review_\(English\).pdf](http://www.blplaw.com/media/how-can-we-help-you/commercial/Myanmar_Companies_Law_Review_(English).pdf) (accessed 22 July 2017)

⁵³ Section 13 of the Corporation Code which provides:

This requirement applies to an export market enterprise (i.e. more than 60% of the company's revenue or output is exported from the Philippines).⁵⁴

But in the case of a "domestic market enterprise" (where more than 30% of the company's sale or service is derived from the Philippine market), and subject to the foreign investment negative list, then a minimum sum of US\$200,000 must be remitted to a Philippines bank account to set up a 100% foreign owned company.⁵⁵

Foreigners are generally not allowed to engage in retail business (as this is reserved for Filipinos), unless they are investing \$2.5 million.⁵⁶

It should also be noted that, unusually, the Constitution of the Republic of the Philippines⁵⁷ prescribes the "Filipinization"⁵⁸ of certain areas of investment 'when the national interest dictates',⁵⁹ and of a "public utility"⁶⁰ by requiring that any form of authorisation for the operation in these areas should be granted only to citizens of the Philippines or to corporations or associations organised under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens.⁶¹

Amount of capital stock to be subscribed and paid for the purposes of incorporation. - At least twenty-five percent (25%) of the authorised capital stock as stated in the articles of incorporation must be subscribed at the time of incorporation, and at least twenty-five (25%) per cent of the total subscription must be paid upon subscription, the balance to be payable on a date or dates fixed in the contract of subscription without need of call, or in the absence of a fixed date or dates, upon call for payment by the board of directors: Provided, however, That in no case shall the paid-up capital be less than five Thousand (P5,000.00) pesos.

⁵⁴ Section 2 of the Republic Act No 7042 (or the Foreign Investments Act) available at <http://www.sec.gov.ph/wp-content/uploads/2015/08/R.A.-7042-also-known-as-the-Foreign-Investments-Act.pdf> (accessed 22 July 2017).

⁵⁵ Defined in section 3 of the Republic Act No 7042 available at <http://www.sec.gov.ph/wp-content/uploads/2015/08/R.A.-7042-also-known-as-the-Foreign-Investments-Act.pdf> (accessed 22 July 2017).

⁵⁶ http://www.sec.gov.ph/wp-content/uploads/2015/01/Minimum-Paid-Up-Capital_Final1.pdf; (accessed 22 July 2017). See the Tenth Foreign Investment Negative List available at <http://www.sec.gov.ph/wp-content/uploads/2015/08/EONo.-184-The-Tenth-Regular-Foreign-Investment-Negative-List.pdf> (accessed 22 July 2017).

⁵⁷ Available at <http://hrlibrary.umn.edu/research/Philippines/PHILIPPINE%20CONSTITUTION.pdf>. (accessed 22 July 2017).

⁵⁸ See *Gamboa v Teves et al.* (G.R. No. 176579, 28 June 2011) available at <http://sc.judiciary.gov.ph/jurisprudence/2011/june2011/176579.html#sdfootnote41anc>. (accessed 22 July 2017).

⁵⁹ Section 10, Article XII (National Economy and Patrimony) of the Constitution 1987. For such areas, see the Republic Act No 7042 (or the Foreign Investments Act).

⁶⁰ Section 11, Article XII of the Constitution.

⁶¹ The Philippines Supreme Court decided in *Gamboa v Teves et al.* (G.R. No. 176579, 28 June 2011) that the term 'capital' in Section 11, Article XII of the Constitution refers only to shares of stock entitled to vote in the election of directors, and not to the total outstanding capital stock

SINGAPORE	<p>With exceptions for national security purposes and in certain industries (including telecommunications, broadcasting, the domestic news media, financial services, legal services, public accounting services, ports and airports, and property ownership), no restrictions are placed on foreign ownership of Singapore corporations.</p> <p>A foreigner who wants to set up a company in Singapore is required to appoint a locally resident director. The foreigner can continue to reside outside Singapore.</p>
THAILAND	<p>Shareholders required to pay at least 25% of the registered capital.⁶² The official fee for registration of the MOA for a private limited company is 50 baht per 100,000 baht of registered capital. A fraction of 100,000 baht is regarded as 100,000 baht. The minimum fee is 500 baht and the maximum fee is 25,000 baht.⁶³ It seems likely that most private companies will be registered with 100,000 Baht capital. The shareholders must therefore pay up at least 25% of that figure.</p> <p>Setting up a wholly foreign-owned company can be difficult because the Foreign Business Act 1999⁶⁴ requires “foreigners”⁶⁵ to obtain a foreign business licence. A Foreign Business License is generally granted to foreign owned businesses that are unique and do not compete with Thai businesses.⁶⁶ Anecdotally, obtaining a licence can take years to be granted by the Ministry of Commerce.⁶⁷ It is therefore usually recommended that a joint venture company be formed with the majority of shares held by a Thai citizen. Alternatively, the foreign</p>

comprising both common and non-voting preferred shares. The Philippine Securities and Exchange Commission subsequently issued guidelines which applied the constitutionally-required percentage of Filipino equity to both (a) the total number of outstanding shares of stock entitled to vote in the election of directors, and (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors. This position has since been affirmed by the Supreme Court in *Roy III v. Chairperson Teresita Herbosa, et. al.* (G.R. No. 207246, 22 November 2016). This particular point was also raised at the team’s Manila Roundtable.

⁶² <http://www.doingbusiness.org/data/exploreeconomies/thailand> (accessed 4 July 2017).

⁶³ http://www.boi.go.th/index.php?page=setting_up_a_business (4 July 2017).

⁶⁴ Available on the Department of Business Development, Ministry of Commerce webpage: http://www.dbd.go.th/dbdweb_en (accessed 22 July 2017).

⁶⁵ Defined in section 4 of the Foreign Business Act 1999 as including: ‘a juristic person registered in Thailand, being ... a juristic person at least one half of capital shares of which are held by [a natural person who is not of Thai nationality, or a juristic person not registered in Thailand ...].’

⁶⁶ Section 8 of the Foreign Business Act 1999, available at <http://www.suthiponglaw.com/index.php?lay=show&ac=article&id=538663419> (accessed 4 July 2017).

⁶⁷ <http://www.healyconsultants.com/thailand-company-registration/setup-llc/> (accessed 4 July 2017). This was also alluded to by a participant at the Bangkok Roundtable who said that ‘the letter of the law differs from actual operation and control’.

	investor can apply to be part of a special Board of Investment (BOI) program.
VIET NAM	<p>A foreign investor may set up an “enterprise with one hundred (100) per cent foreign owned capital”.⁶⁸ Such an enterprise has to be established as a “limited liability company”.⁶⁹</p> <p>It appears that the authorities will expect the investor to commit a reasonable amount of charter capital according to the scale and business scope of the project.⁷⁰ Article 16 of the Investment Law of Viet Nam also stipulates that “[t]he legal capital of an enterprise with foreign owned capital must be at least thirty (30) per cent of its invested capital. In special cases and subject to approval of the body in charge of State management of foreign investment, this proportion may be lower than thirty (30) per cent. During the course of its operation, an enterprise with foreign owned capital must not reduce its legal capital.”</p> <p>A foreign investment certificate is required and a minimum investment of USD10,000 is usually needed.⁷¹</p>

Source: Compiled from a variety of sources and subject to further verification.

Continuing Compliance

The survey sought input on the perceived difficulty of compliance with typical company law requirements such as the holding of annual meetings, the preparation and filing of financial statements and the maintenance of registers and records. The survey respondents did not see continuing compliance obligations as particularly onerous or burdensome.

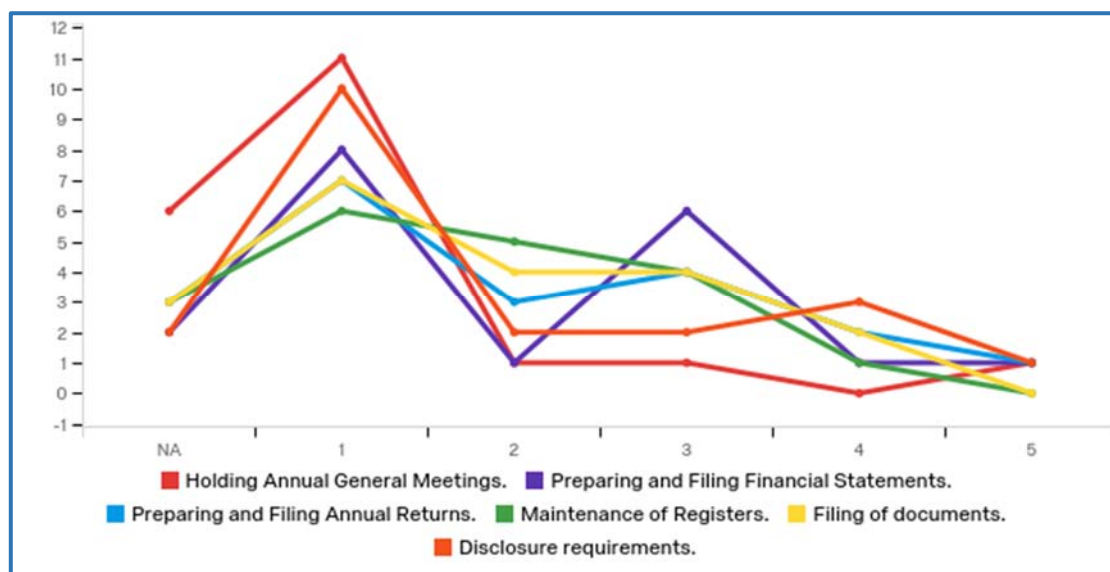
⁶⁸ Chapter 2, Article 4 of the Law on Foreign Investment in Viet Nam. See also <http://www.vietnam-briefing.com/news/setting-foreigninvested-enterprise-vietnam.html/> (accessed 4 July 2017). See also other restrictions for “conditional sectors” discussed in Section 4 of this Interim Report.

⁶⁹ Article 15 of the Law on Foreign Investment in Viet Nam.

⁷⁰ Participants at the Ho Chi Minh City Roundtable confirmed that whilst the Vietnamese government is enthusiastic about foreign investment, setting up a brand new company is an involved process. The participants also flagged the requirement for a registered office as being very important to the entire process.

⁷¹ <http://www.healyconsultants.com/vietnam-company-registration/setup-llc/> (accessed 4 July 2017).

Chart 8: Survey Responses on Continuing Obligations



Online Registry of Companies

The team's survey asked if respondents would find an online directory of companies registered in ASEAN countries (listing only basic information such as the company name in English, registered address, date and country of incorporation, names of directors, names of shareholders) useful. Respondents were positive about such a directory for the following reasons:

Potential customers source of new business.

Critical to mergers and acquisitions and joint ventures.

Permits due diligence inquiries to certain extent as the existence of the entity can be validated.

Point of contact and visibility of decision makers to satisfy know your client requirements.

Preliminary Findings and Recommendations

The ASEAN Work Programme on Starting a Business notes that the ultimate goal for ASEAN should be to harmonise the regulatory requirements for starting businesses across ASEAN. Discrepancies across the region will, as the Report notes, 'slow down progress in establishing a common market'. Indeed, the respondents to the team's survey, when asked 'What are the three highest-priority areas of laws and procedures in ASEAN countries in which your company would like to see prompt improvement?' indicated the following in order of priority:

complexity of procedures	equity restrictions	harmonisation
<ul style="list-style-type: none"> • company registration and creation • ease of business establishment 	<ul style="list-style-type: none"> • reduction of foreign investment restrictions • elimination of minimum paid-up requirements for companies involving foreign investors 	<ul style="list-style-type: none"> • standardisation and simplification of laws and procedures across ASEAN countries • harmonisation of corporate laws

Preliminary Recommendation

The team recommends the following:

(i) Simplification of administrative processes

- For member States that require physical submission of documents for incorporation applications, to consider making the necessary forms available online, and to move towards enabling fully electronic submission of incorporation documents (including enabling online payment of necessary fees).
- Work towards a fast-track process for the incorporation of a company by any member State citizen or entity wishing to invest in another member State.

(ii) Foreign equity restrictions

- Consider whether there are areas in which foreign equity limits may be lifted for investing parties which are domiciled in an ASEAN member State or who are citizens of an ASEAN member State.

(iii) Harmonisation

- Consider the feasibility of common registration requirements (including the possibility of basic incorporation forms that are common across ASEAN member States).
- Establish a searchable online registry of companies registered in ASEAN member States.
- Establish a searchable online sub-directory of MSMEs registered in ASEAN member States.

SECTION 3 TRADE AND INVESTMENT BARRIERS

Trade Barriers

Trade barriers in the form of tariff and non-tariff barriers (NTBs) continue to pose obstacles for ASEAN businesses.

The research shows that two main areas of trade regulation and government activity continue to be of concern, namely:

- The implementation of existing ASEAN agreements which reduce or eliminate barriers; and

- The need for trade facilitation measures to simplify laws and procedures for cross-border trade in ASEAN. Such measures address both customs and non-customs issues.

Overview and State-of-Play in ASEAN Trade

Tariff Barriers

Under the ASEAN Free Trade Area and ASEAN Trade in Goods Agreement, all ASEAN member States have eliminated intra-ASEAN tariffs for 99.65% of tariff lines, except for Cambodia, Lao PDR, Myanmar and Vietnam, which have reduced tariffs to 0-5% for 98.86% of their tariff lines.⁷² A number of tariffs still remain, including a number of tariff peaks for certain goods.⁷³ With the majority of tariffs being eliminated in intra-ASEAN trade, more focus is being placed on non-tariff barriers (NTBs) and trade facilitation measures.

⁷² See ASEAN, <http://asean.org/asean-economic-community/asean-free-trade-area-afta-council/> and <http://investasean.asean.org/index.php/page/view/asean-free-trade-area-agreements/view/757/newsid/872/asean-trade-in-goods-agreement.html> (accessed on 20 July 2017). The tariff reductions have resulted from targets set under ASEAN's Common Effective Preferential Tariff arrangements (CEPT) and under the ATIGA. See generally, OECD, Economic Outlook for Southeast Asia, China and India 2016, pp. 136-8.

⁷³ See generally, Rahul Sen, Sanchita Basu and Sadhana Srivastava, "AEC Vision Post-2015: Is an ASEAN Customs Union Feasible?", ISEAS Economics Working Paper No. 2015-1, February 2015, pp. 9-10.

Non-Tariff Barriers

A significant number of non-tariff measures (NTMs) which impede trade continue to exist.⁷⁴ This is confirmed both by literature and feedback from businesses.⁷⁵

Through the Master Plan on ASEAN Connectivity 2025 (MPAC 2025), ASEAN member States have prioritised a) the harmonisation or mutual recognition of standards, conformance and technical regulations of products for three prioritised key sectors, and b) making NTMs more transparent and to reduce trade-distorting NTMs.⁷⁶

A number of databases provide information on ASEAN NTMs.⁷⁷

The Table below shows the NTMs notified by ASEAN countries as at July 2017. The categories these NTMs fall under are sanitary and phyto-sanitary (SPS), technical barriers to trade (TBT), anti-dumping (AD), safeguards (SG), special safeguards (SSG), quantitative restrictions (QRs), tariff rate quotas (TRQ) and export subsidies (XS).

⁷⁴ See ERIA, "Non-Tariff Measures in ASEAN" Edited by Lili Yan Ing, Santiago Fernandez de Cordoba, and Olivier Cadot (2016), available at: http://www.eria.org/publications/key_reports/FY2015/No.01.html (accessed on 17 July 2017). See also country-specific studies such as "A Field Survey: Non-Tariff Measures (NTMs) Faced by Exporters of Lao PDR, Package No. RFP/08/FY14, Second Trade Development Facility, Project No. P130512, 4 September 2016.

⁷⁵ The team's discussion with a Lao business representative confirmed that Lao PDR businesses face NTBs when trading with other ASEAN countries; teleconference discussion, 26 April 2017. See also, Rahul Sen, Sanchita Basu and Sadhana Srivastava, "AEC Vision Post-2015: Is an ASEAN Customs Union Feasible?", ISEAS Economics Working Paper No. 2015-1, February 2015, pp. 11-13.

⁷⁶ MPAC 2025, pp. 59-61.

⁷⁷ These include the WTO *Integrated Trade Intelligence Portal* (I-TIP) and the ASEAN *NTM Database*: http://asean.org/?static_post=non-tariff-measures-database (accessed on 23 July 2017). Other tools being developed and implemented are the ASEAN Tariff Finder, ASEAN Trade Repository (ATR; developed along with National Trade Repositories of each member State, to increase transparency of trade laws) and the ASEAN Solutions for Investments, Trade and Services (ASSIST, an online complaints system).

Table 5: NTMs notified by ASEAN member States at the WTO

Member(s) imposing:	Brunei Darussalam OR Cambodia OR Indonesia OR Lao People's Democratic Republic OR Malaysia OR Myanmar OR Philippines OR Singapore OR Thailand OR Viet Nam								
Partner(s) affected:	Any [Include the category "All members"]								
Date(s):	30/06/2017 [initiated, in force]								
Product(s):	Any								
Keywords:	Any								
<input type="button" value="Modify"/>									
Search result									
		SPS	TBT	ADP	SG	SSG	QR	TRQ	XS
Asia	Brunei Darussalam	3	2						
	Cambodia		3						
	Indonesia	114	116	47	5			2	1
	Lao People's Democratic Republic	1	1				12		
	Malaysia	37	232	21	3			13	
	Myanmar		2						
	Philippines	353	252	2	3	7	21	14	
	Singapore	58	49				91		
	Thailand	237	601	52	2		112	23	
Viet Nam	86	94	7	5			2		
Asia Total	889	1352	129	18	7	236	54	1	
Least-developed countries	Cambodia		3						
	Lao People's Democratic Republic	1	1				12		
	Myanmar		2						
Least-developed countries Total	1	6				12			
Grand Total	889	1352	129	18	7	236	54	1	

Source: WTO I-TIP Database, July 2017.

Such NTMs are **not necessarily** more trade-restrictive than necessary or violative of treaty commitments. The utility of the Table is twofold:

- it shows **where the most notified NTMs are found**;
- it raises the question as to whether ASEAN member States can do more to reduce these NTMs, particularly if they relate to goods in the **ASEAN Priority Integration Sectors**.

The ASEAN Trade Repository (ATR) is to be the database of ASEAN trade laws, tariffs, NTMs and other information. The ASEAN Secretariat also maintains a very useful "**Matrix of Actual Cases**" which provides information on reports of NTBs received from ASEAN member States.⁷⁸

Comparing the information available from the WTO web facility on NTMs with ASEAN's ATR and Matrix of Actual Cases, the following observations may be made:

- The ATR does not appear to integrate the ASEAN Matrix of Actual Cases in its searchable database;
- The latest date of input of material is unclear.

78

See ASEAN Secretariat, <http://asean.org/asean-economic-community/asean-free-trade-area-afta-council/other-documents/> (accessed on 23 July 2017).

Preliminary Recommendation

The team recommends that the ATR and Matrix of Actual Cases be integrated to provide an up-to-date, searchable database.

Note:

Under the AEC Blueprint 2025, member States aim to “explore alternative ways to addressing NTMs such as sectoral or value chain approaches to deal with NTMs”. This provides scope for further, separate research on ways to reduce NTMs within the regional and global value chain context.

The ASEAN ‘Noodle Bowl’⁷⁹ - Multiplication of FTAs and Rules

Preferential trade agreements contain rules of origin (ROOs) which determine whether imports enjoy preferential tariff treatment under the agreements. ROOs therefore serve a gate-keeping function to the benefits of such trade agreements.

As trade agreements may have different ROO requirements, this leads to a complex web of rules for exporters and importers, when determining whether preferences are enjoyed by their goods. In addition, under each agreement, there may be certain product-specific rules (PSRs). As ASEAN countries may each have preferential agreements with a number of other countries, all this makes determination of the applicable rule complicated for businesses.⁸⁰

The team’s survey supports the finding that complex rules can be a concern for businesses in the region.⁸¹

Implementation of Existing Legal Obligations

Three key ASEAN transport agreements to facilitate cross-border trade are still not fully ratified or implemented.⁸² The ASEAN Transport Strategic Plan 2016-2025 aims to operationalise these three Agreements, which are:

⁷⁹ The expression is a variant of the reference to a myriad of rules in a “spaghetti bowl” by Professor Jagdish Bhagwati; see Bhagwati, J. “US Trade Policy: The Infatuation with Free Trade Agreements”, Discussion paper series, Columbia University, 1995.

⁸⁰ A number of steps have been taken to address these concerns, including the ASEAN Self-Certification System; See ASEAN Secretariat, <http://www.asean.org/storage/images/2015/October/outreach-document/Edited%20ROO%20Self%20Certification.pdf> (accessed on 23 July 2017), Singapore Customs, https://www.customs.gov.sg/~/-/media/cus/files/insync/issue11/article_5.html (accessed on 23 July 2017) and USAID, http://pdf.usaid.gov/pdf_docs/PA00MBQH.pdf (accessed on 23 July 2017). See also generally, Stefano Inama and Edmund W. Sim, “Rules of Origin in ASEAN – A Way Forward”, Cambridge University Press (2015).

⁸¹ See also OECD, “Economic Outlook for Southeast Asia, China and India 2016”, p. 138.

⁸² See ASEAN, <https://acts.asean.org/publications/asean-framework-agreement-facilitation-goods-transit-afafgit>.

- the ASEAN Framework Agreement on the Facilitation of Goods in Transit (AFAFGIT),^{83 84}
- the ASEAN Framework Agreement On The Facilitation Of Inter-State Transport (AFAFIST); and
- the ASEAN Agreement on Multimodal Transport (AFAMT).

Trade Facilitation and Legal Barriers in ASEAN

Trade facilitation is a critical component in advancing the AEC's legal and regulatory connectivity. Trade facilitation components which require legal support and removal of barriers include transparency, formalities, paperless trade and transit facilitation arrangements.⁸⁵

Recognising the impact which regulatory activity can have on business costs, ASEAN Economic Ministers agreed in March 2017 to reduce 10% of trade transaction costs by 2020.⁸⁶ Trade facilitation is an important contributor to the realizing of this aim. ASEAN members are aware of the costs of “red tape” and have taken a number of important steps to address trade facilitation, with the Philippines National Competitive Council embarking on a “Project Repeal” to reduce ‘red tape’ in laws, regulations and government procedures to raise the competitiveness of the country as an investment destination and for its businesses.⁸⁷

A lack of harmonisation of customs procedures, customs tariffs and of mutual acceptance of documents in ASEAN, and arbitrariness in estimating the value of goods for tariff purposes, can impede cross-border trade.⁸⁸

⁸³ Date of signing: 1998, ratified by 1999, date of entry into force: 2000. Under Article 33, the Agreement shall enter into force upon the deposit of Instruments of Ratification or Acceptance by all Contracting Parties with the ASEAN Secretary-General. See ASEAN, <https://acts.asean.org/publications/asean-framework-agreement-facilitation-goods-transit-afafgit>. As at May 2017: Protocols signed and ratified by all ten member States are 3, 4, 5, 8; 8 member States have signed Protocol 2, Protocols 1, 6, 7 and 9 have not been ratified by all member States. See Joint Media Statement of the 26th Meeting of the ASEAN Directors-General of Customs, Bali, 16 -18 Indonesia May 2017 at asean.org/storage/2017/05/DG-26-41-Joint-Media-Statement.pdf.

⁸⁴ The Protocol 7 Customs Transit System initiative, led by Singapore, is progressing; under the ASEAN Customs Transit System initiative, traders will only need a single customs document and one guarantee for transit to trade in countries of the region. See Singapore Customs, <https://www.customs.gov.sg/~media/cus/files/insync/issue25/article2.pdf> (accessed on 20 July 2017). See also ASEAN Economic Integration Brief, No. 1, June 2017.

⁸⁵ See for example, these parameters used in the Joint United Nations Regional Commissions, “Trade Facilitation and Paperless Trade Implementation Survey 2015 - Asia and the Pacific Report”, ESCAP (2015). A Global report and regional reports on a 2017 survey is expected to be published in the near future.

⁸⁶ ASEAN Economic Integration Brief, June 2017, p. 3.

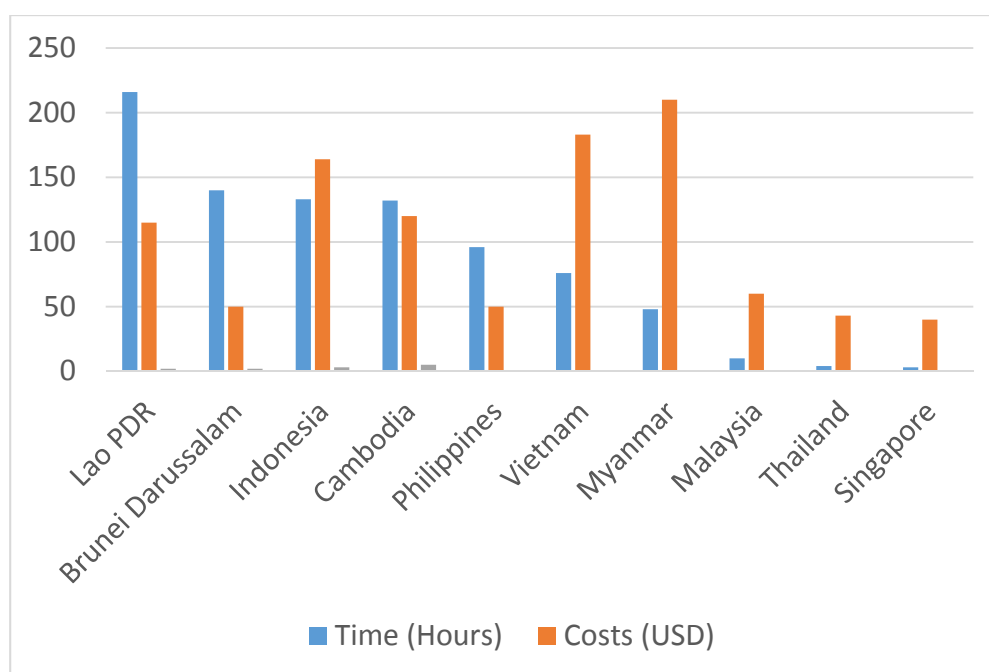
⁸⁷ See <http://www.investphilippines.info/arangkada/tag/project-repeal/>.

⁸⁸ Nimnul Piewthongngam S.J.D. & Prasert Vijitnopparat, “Trade Facilitation – Cost of Non-cooperation for Consumers in the ASEAN Economic Community”, Asia Foundation, February 2014, pp. 25-26. See also, *ASEAN Business Advisory Council Report to Leaders*, September 2016.

Documentary Compliance Requirements

The World Bank’s Doing Business 2017 East Asia and Asia-Pacific (DB 2017 EAAP) data suggests that documentary compliance in import and export of goods in ASEAN can still be very time-consuming and expensive. Charts 9 and 10 below show the unevenness in time and costs taken for documentary compliance with respect to importing goods in ASEAN member States. The data suggests that a great deal more attention to facilitating documentary compliance – which is linked to legal requirements and procedures - is required.⁸⁹

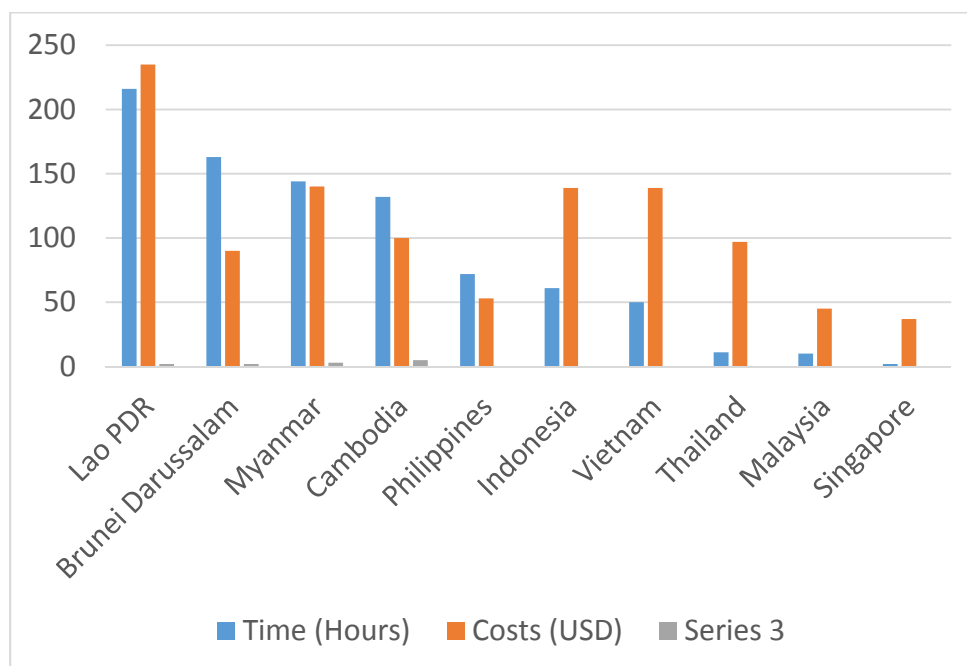
Chart 9: ASEAN: Documentary Compliance – Time (Hours) and Costs (USD) to Import



Source: Based on data in DB 2017 EAAP

⁸⁹ Other measures of time taken for imports are available, such as those of logistics associations; see “Vietnam Logistics Industry Draws Global Attention”, 12 July 2017, *Vietnamnet*.

Chart 10: ASEAN: Documentary Compliance – Time (Hours) and Costs (USD) to Export



Source: Based on data in DB 2017 EAAP

National Single Windows (NSWs)

ASEAN members have committed to the establishment of NSWs to facilitate electronic processing of customs documents. As at July 2017, not all ASEAN member States have operational NSWs. In the case of Cambodia, for instance, only specific pilot/trial projects with selected businesses have been in progress, and the NSW is not fully operational yet. Customs documents must still be submitted for approval in paper form (though these are downloadable from a website).⁹⁰

ASEAN Single Window (ASW)

The ASW, which will integrate NSWs, will facilitate clearance of goods, decrease business costs and improve transparency of customs procedures in the region.⁹¹ Member States have committed legally to the ASW.⁹²

⁹⁰ The team's discussion with a Lao business representative, teleconference discussion, 26 April 2017.

⁹¹ See ASEAN, at: <http://www.asean.org/storage/images/2015/October/outreach-document/Edited%20ASEAN%20Single%20Window-2.pdf> (accessed on 2 August 2017).

⁹² See the Agreement to Establish and Implement the ASEAN Single Window, Kuala Lumpur, Malaysia, 9 December 2005; text available at: http://asean.org/?static_post=agreement-to-establish-and-implement-the-asean-single-window-kuala-lumpur-9-december-2005-2, Protocol to Establish and Implement the ASEAN Single Window, Siem Reap, Cambodia, 20 December 2006 and Protocol on the Legal Framework to Implement the ASEAN Single Window, Hanoi, Vietnam, 4 September 2015.

Pilot projects have been undertaken with the following documents for ASW exchange:⁹³

- ASEAN Trade in Goods Agreement (ATIGA) Form D;
- ASEAN Customs Declaration Document (ACDD).

Member States are gradually transitioning into ‘live’ exchanges of these documents on the ASW – at least four member States are ready for such exchanges (see Table 6 below). Two of ASEAN’s least developed countries, Cambodia⁹⁴ and Lao PDR⁹⁵ are aiming to join the “live” exchange by the end of 2017. Brunei has a NSW but has not joined the ASW.⁹⁶ Myanmar launched the Myanmar Automated Cargo Clearance System in January 2016 as a step toward a NSW.⁹⁷

TABLE 6: State of Play of ASEAN Single Window Legal Implementation

ASEAN Member State	Exchange-Readiness with e-ATIGA Form D
Brunei	x
Cambodia	By end 2017
Lao PDR	By end 2017
Myanmar	x
Philippines	x
Indonesia	✓ (“live”)
Malaysia	✓ (“live”) ⁹⁸
Singapore	✓ (“live”)
Thailand	✓ (“live”) ⁹⁹
Vietnam	✓

Source: Extracted from Table in ASEAN Business Advisory Council Report to the Leaders, September 2016 and updated by research team with information as at July 2017.

⁹³ See ASEAN, <http://asw.asean.org/about-asw>. See also <http://asw.asean.org/component/content/category/13-static-pages>.

⁹⁴ Cambodia has committed to testing in mid-2017 and to go live with exchange e-ATIGA Form D by the end of 2017. See <http://asw.asean.org/nsw/cambodia/cambodia-general-information>.

⁹⁵ Lao PDR’s NSW was launched at the end of 2016 and expects to join ASW by the end of 2017. See <http://asw.asean.org/nsw/lao-pdr/lao-pdr-general-information/>. For further updates, see generally, <http://asw.asean.org/#>.

⁹⁶ See <http://www.bdnew.gov.bn/Pages/Home.aspx>.

⁹⁷ See <http://asw.asean.org/nsw/myanmar/myanmar-general-information> (accessed on 20 July 2017) and <http://www.myanmartradeportal.gov.mm/index.php?r=site/display&id=771>.

⁹⁸ See MITI, at: <http://www.miti.gov.my/index.php/pages/view/3794>.

⁹⁹ See <https://d2oc0ihd6a5bt.cloudfront.net/wp-content/uploads/sites/1871/2012/04/ASEAN-Custom-Integration-and-ASEAN-Single-Window.pdf>.

Harmonised Tariff Classification

The ASEAN Agreement on Customs provides for member States to adopt a standard code at the 8-digit level, to provide consistency and facilitate trade. The ASEAN harmonised code (AHTN 2017), harmonised at the 8-digit level across all ASEAN member States, is in effect in a majority of member States. Lao PDR, Myanmar, Philippines and Viet Nam are continuing to implement its use.¹⁰⁰

Standardised Customs Fees and Valuations, Advance Rulings and Average Release Times

ASEAN has worked continually on various trade facilitation actions, including those under the WTO Agreement on Customs Valuations and the ASEAN Customs Agreement.¹⁰¹ Implementation issues of such agreements still exist. For example, arbitrary classification of products and *ad hoc* tariff pricing have been identified by businesses to still exist.¹⁰²

Two areas which have been raised in the trade literature as being able to provide greater certainty and transparency in ASEAN are the provision of **advance rulings** and **establishment and publication of average release times** for goods.¹⁰³ Advance rulings may pertain to rules of origin (e.g. under the WTO Agreement on ROO), tariff classification and valuation. Advance rulings systems have been put in place in the member States to provide greater certainty and predictability to traders. However, not all ASEAN member States provide information on average release times of goods.

¹⁰⁰ HS codes are used to determine the tariffs, controls and rule of origin of goods and for trade statistics; Singapore Customs: <https://www.customs.gov.sg/businesses/harmonized-system-hs-classification-of-goods>.

¹⁰¹ Phuket, Thailand, 1 March 1997. ASEAN has also developed an ASEAN Customs Valuation Guide (2003) for customs authorities.

¹⁰² See Miti Garg and Sumeet Gupta (eds.), "Cases on Supply Chain and Distribution Management: Issues and Principles", Business Science Reference (2012), at p. 65. For country illustrations, see for example, Myrna S. Austria, "The Philippines and the AEC Beyond 2015", (2015) 32 Journal of Southeast Asian Economics 220, pp. 220-238, at p. 229, citing Wignaraja, Ganesh, Dorothea Lazaro and Genevieve DeGuzman. "FTAs and the Philippine Business: Evidence from Transport, Food and Electronics Firms". ADB Working Paper 185. Tokyo: Asian Development Bank, 2010, and report, "Long Improvised Customs Fees to be Subsidized", 28 February 2017, *Cambodia Daily*. See also Banomyong, note 126126 below, on the issues in the context of logistics service contracts in CLMV.

¹⁰³ See Joint United Nations Regional Commissions, "Trade Facilitation and Paperless Trade Implementation Survey 2015 - Asia and the Pacific Report", ESCAP (2015). A Global report and regional reports on a 2017 survey is expected to be published in the near future.

International Trade Facilitation Tools

Tools designed to address supply chain security as well as facilitate international trade include Authorized Economic Operator (AEO) programmes.¹⁰⁴ Such programmes allow countries to establish trade facilitative measures to expedite import, export, transit and other formalities for entities which meet set security and internal controls criteria as Authorized Economic Operators. The **AEC Blueprint 2025** aims to “**deepen regional implementation of trade-facilitative ASEAN initiatives such as Authorised Economic Operators (AEO) programme and Self-Certification programme**”.¹⁰⁵

The WTO’s Trade Facilitation Agreement (TFA), which all ASEAN member States have accepted, requires each WTO member that accepts the agreement to provide particular trade facilitation measures (over and above general trade facilitation measures in the TFA) related to import, export, or transit formalities and procedures in at least three of the following areas to specified “authorised operators” who meet certain criteria (such as AEOs):¹⁰⁶

- (a) low documentary and data requirements, as appropriate;*
 - (b) low rate of physical inspections and examinations, as appropriate;*
 - (c) rapid release time, as appropriate;*
 - (d) deferred payment of duties, taxes, fees, and charges;*
 - (e) use of comprehensive guarantees or reduced guarantees;*
 - (f) a single customs declaration for all imports or exports in a given period; and*
 - (g) clearance of goods at the premises of the authorized operator or another place authorized by customs.¹⁰⁷*
-

¹⁰⁴ See Framework of Standards to Secure and Facilitate Trade (SAFE Framework), World Customs Organization (2012), <http://tfig.unece.org/contents/wco-safe.htm> and <http://tfig.unece.org/contents/authorized-economic-operators.htm>.

¹⁰⁵ The aim is to establish an ASEAN-wide self-certification programme; see e.g. “Asean to focus on digital economy, trade facilitation in 2018 with Singapore as chair”, 4 May 2017, *Business Times*, <http://www.businesstimes.com.sg/government-economy/asean-to-focus-on-digital-economy-trade-facilitation-in-2018-with-singapore-as>.

¹⁰⁶ Art. 7.7, TFA. The TFA entered into force on 22 February 2017. The list of WTO members which have ratified the TFA can be found here: <http://www.tfafacility.org/ratifications> (accessed on 23 July 2017). As at 23 July 2017, of the ASEAN member States, only Indonesia has not ratified the agreement yet.

¹⁰⁷ Art. 7.3, TFA.

Presently, **not all** ASEAN countries operate Authorized Economic Operators (AEO) programmes. Those which do are Indonesia, Malaysia, Singapore, Thailand and Vietnam.¹⁰⁸ ASEAN member States which have accepted the TFA but which have not established AEO programmes - namely, Brunei Darussalam, Cambodia,¹⁰⁹ Lao PDR, Myanmar¹¹⁰ and the Philippines - will need establish such programmes in accordance to the schedules set out in the TFA, and the trade facilitation obligations for AEOs under it, as shown above.¹¹¹ The use of Mutual Recognition Agreements (MRAs) can contribute to building regional trust in AEOs and further facilitate trade.

The use of AEOs can also help MSMEs, if such enterprises are provided with suitable training to make use of the systems.¹¹²

Preliminary Recommendations

The team recommends:

- Implementation of existing agreements;
- Rollback and standstill of NTMs and restrictions for services in Priority Integration Sectors;
- Alignment of trade facilitation actions with requirements of the TFA and accelerating implementation of the TFA where possible;
- Establishment of AEO systems in all ASEAN member States; and
- Implementation of trade facilitation measures with AEOs and MSMEs in mind.

Regulatory Issues

In some countries, there appear to be too many laws regulating an area of trade. For example, in some situations, there could be one main law leading to implementing regulations, under which further new rules are created by separate agencies.¹¹³ Discussions during the team's Roundtables appeared to support this view.

¹⁰⁸ Asian countries (apart from those in ASEAN) using AEO programmes include China, Chinese Taipei, Hong Kong, India, Japan, Korea; see Compendium of Authorized Economic Operator Programmes, World Customs Organization (2016), available at: <http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/tools/aeo-compendium.aspx>.

¹⁰⁹ Cambodia's best traders programme to lead to AEO implementation by 2018: <http://www.customs.gov.kh/businesstraders-3/best-traders/> (accessed on 23 July 2017).

¹¹⁰ Myanmar is expected to introduce an AEO system in October 2017: <https://www.jiffa.or.jp/en/news/entry-4489.html> (accessed on 23 July 2017).

¹¹¹ The TFA implementation system permits developing countries and least developed countries to self-designate in relation to the implementation periods – see Art. 14.2 TFA; see generally, Section II, TFA.

¹¹² "Making WTO TFA Work for SMEs", UNESCAP, pp. 8-9.

¹¹³ See for example, report on the area of food safety and hygiene regulation in Vietnam, "In VN, Many Ministries Oversee One Noodle", 7 July 2017, *VietNamNet News*, at: <http://m.english.vietnamnet.vn/fms/business/181597/in-vn--many-ministries-oversee-one-noodle.html>. See also report on this sector, stating that: "In the legal system of food safety legislation, there is one law, one decree and nearly 80 circulars of the combined three ministries." *Finance Vietnam, Intelliasia*, 2 April 2017, at pp. 27-28.

One respondent to the team's online survey cited specifically a related concern: a "lack of clarity on export controls".

Supply Chain Contracts

The team's survey received a number of responses from businesses which were engaged in supply chains.

To the question, "Does your company use or participate in a supply chain in ASEAN for its goods?":

33.3% of the 15 respondents who answered this question replied in the **affirmative**.

To the follow-up question, "Would a set of model contract provisions that could be adopted and commonly used by ASEAN supply chain users be useful to your business?":

four out of the five (80%) respondents replied in the **affirmative**.

Note:

While the number of responses is small, the above responses suggest that there may be scope to explore establishment of model contract clauses in ASEAN supply chains in separate, further research.

Investment Barriers

Foreign Investment Restrictions

While a degree of investment liberalisation has occurred in the AEC significant legal barriers still exist within ASEAN. Investment liberalisation under the ACIA is ongoing.¹¹⁴

The ACIA's investment liberalisation agenda is presently limited to the following sectors:

(a) manufacturing;

(b) agriculture;

(c) fishery;

(d) forestry;

(e) mining and quarrying;

(f) services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying; and

(g) any other sectors, as may be agreed upon by all Member States.¹¹⁵

The liberalisation provisions also exclude measures under services under the ASEAN Framework Agreement on Services (AFAS). As will be seen below, the AFAS liberalisation negotiations are handled separately. ASEAN countries are working towards a new agreement for services liberalisation, the Agreement on Trade in Services (ATISA).¹¹⁶ Under AFAS, seven priority sectors were identified:¹¹⁷

- Air transport
- Business services
- Construction
- Financial services
- Maritime transport
- Telecommunications
- Tourism.

¹¹⁴ See Art. 1, 2 and 9, ACIA, the member States' Reservation Lists, and OECD, "Economic Outlook for Southeast Asia, China and India 2016", at p. 151.

¹¹⁵ Art. 3.3, ACIA. On ASEAN investment liberalisation, see generally, Ponciano S. Intal Jr, "AEC Blueprint Implementation Performance and Challenges: Investment Liberalization", ERIA-DP-2015-32, April 2015.

¹¹⁶ For an overview, see ASEAN, <http://asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/services/overview/> (accessed on 22 July 2017).

¹¹⁷ Bangkok Declaration, signed at the Fifth ASEAN Summit, 1995.

Further, under the AEC Blueprint 2007, particular services were identified as Priority Sectors for accelerated liberalisation.¹¹⁸ Member States were to remove substantially all restrictions on trade in services for **air transport, e-ASEAN, healthcare and tourism** by 2010 and for **logistics services**, by 2013. Further, the Blueprint set the following target dates for Mode 3 liberalisation, allowing for foreign (ASEAN) equity participation:

- of not less than 51% by 2008, and **70% by 2010 for the 4 priority services sectors;**
- not less than 49% by 2008, 51% by 2010, and **70% by 2013 for logistics services;** and
- not less than 49% by 2008, 51% by 2010, and **70% by 2015 for other services sectors.**

However, as will be seen below, foreign equity barriers which do not meet the 70% target remain for investments in, for example, **logistics and e-commerce** services. They also exist for services relating to **financial services and infrastructure**. Yet these are four major areas which undergird the development of modern global and regional value chains.

Investment barriers are a continuing concern for businesses seeking to make investments in ASEAN. The existence of problematic investment restrictions was confirmed by the team's survey responses. The survey drew responses indicating **liberalisation of investment restrictions** as one of the top three priorities for some companies, ranging from those with annual turnover below USD 25m to those with a turnover above USD 500m.¹¹⁹

Other studies have also identified investment barriers – particularly in the form of foreign equity participation – as problems. The ASEAN Business Advisory Council (ASEAN-BAC), for example, has identified the removal of foreign equity constraints in four sectors – insurance, transport/logistics, telecommunications and financial services - as part of their top 10 recommendations to ASEAN leaders in September 2016.¹²⁰

Some of the investment barriers illustrated below were introduced or are being maintained *after* the establishment of these service sectors as priority sectors. In addition, it has been observed that the level of services restrictiveness in ASEAN generally remains high.¹²¹

¹¹⁸ See ASEAN Integration in Services (2015), pp. 18-19.

¹¹⁹ These responses were provided to the survey question, "What are the three highest-priority areas of laws and procedures in ASEAN which your company would like to see prompt improvement in?"

¹²⁰ ASEAN-BAC Report to Leaders Sep 2016, p. 2.

¹²¹ See See Figure 2.8, Overall Services Trade Restrictiveness Index in ASEAN, 2008-11, OECD, "Economic Outlook for Southeast Asia, China and India 2016", at p. 144. According to the report, "ASEAN Services Integration", ASEAN Secretariat and World Bank (2015), based on 2012 surveys, despite the efforts under the AFAS, services liberalisation within ASEAN has only been "moderate" in general (p. 53). Restrictions exist in relation to the supply of services

ASEAN PRIORITY INTEGRATION SECTORS

Agro-based products
Air travel
Automotives
e-ASEAN
Electronics
Fisheries
Healthcare
Logistics (added in 2006)
Rubber-based products
Textiles and apparels
Tourism
Wood-based products

One of the objectives of establishing the Priority Integration Sectors was to accelerate services liberalisation in them.¹²² Two of the above overlap with the AFAS priority sectors: **e-ASEAN and logistics**.

The AEC Blueprint 2025 also aims to “explore alternative approaches for further liberalisation of services”.¹²³

One possible approach is to re-examine the overlapping priority areas under the Priority Integration Sectors (for goods) and the AFAS Priority Sectors, together with financial and infrastructure services, and their combined role in meeting global value chain (GVC) needs. A re-grouping of the four related services areas below can help to refocus liberalisation efforts in a manner that better responds to such needs:

- **Logistics services** and **e-commerce** (as part of e-ASEAN); and
- **Financial services** and **infrastructure services**.

Together, these four services areas could be grouped as a **Priority Cluster**, which together can better facilitate ASEAN businesses’ participation in GVCs.

The following discussion illustrates some existing investment restrictions found in these four areas.

under “Mode 3” (under the WTO’s terminology) through commercial presence in the country in question.

¹²² Article 5, ASEAN Framework Agreement for the Priority Integration Sectors, Vientiane, Lao PDR, 29 November 2004. See also ASEAN, <http://asean.org/asean-framework-agreement-for-the-integration-of-priority-sectors-vientiane-29th-november-2004/> (accessed on 24 July 2017).

¹²³ Para. A2.13.

A. Logistics Services-related Foreign Investment Restrictions

ASEAN member States have found that “logistics efficiency has not improved at the pace originally envisaged by MPAC 2010”.¹²⁴ The following are examples of restrictions which some ASEAN member States continue to maintain the right to impose in relation to logistics-related investments.

Examples:

Indonesia

TABLE 7: Examples of Foreign Investment Restrictions in Logistics

ASEAN Priority Sector Affected	Examples of Related Investment Barriers ¹²⁵	Restriction
Logistics	Various forms of transportation	Maximum 49% Foreign Capital ownership
	Freight forwarding services and air freight forwarding services	Maximum 67% Foreign Capital ownership
	Multimode transport services	Maximum 49% Foreign Capital ownership

Restrictions Maintained under the Protocol to Implement the Ninth Package of Commitments under AFAS

Brunei Darussalam

Brunei has maintained, for storage and warehousing and marine freight forwarding, a restriction that foreign equity participation must not exceed 51%.

Thailand

Under the Protocol, for various logistics-related services, Thailand has maintained restrictions such that foreign equity participation is not to exceed 49%, 51% or 70% (depending on the service in question) and in the latter two categories, also only through a joint venture with a Thai juridical person.

¹²⁴ MPAC 2025, p. 9.

¹²⁵ Presidential Regulation No. 44 of 2016.

CLMV

Within Cambodia, Lao PDR, Myanmar and Viet Nam, for example, a number of legal barriers exist in respect of logistics services.¹²⁶ Two examples of such barriers are foreign investment restrictions¹²⁷ and the lack of standardised logistics contracts.¹²⁸

Malaysia - incentives

For integrated logistics services including warehousing, transportation and freight forwarding, at least 60% of equity must be owned by Malaysians to receive incentives.¹²⁹ However, companies which are approved as International Integrated Logistics Services (IILS) providers (companies that provide integrated and seamless logistics services (door-to-door) along the logistics supply chain as a single entity on a regional or global scale) are allowed 100% foreign equity ownership.¹³⁰

B. E-Commerce: Preliminary Observations

The E-ASEAN Framework Agreement has to date been signed and ratified by only six member States and is not yet in force.¹³¹ However, ASEAN has been proceeding to facilitate e-commerce in other ways, such as through the AEC Blueprint 2025 and the ASEAN Framework on Data Protection.

ASEAN e-commerce is an area which merits further separate research. Foreign equity restrictions still exist in the logistics, telecommunications and financial sectors, three sectors which undergird e-commerce activities as well as certain regional and global value chains.

Interestingly, for green field investments, foreign equity restrictions for mobile telecommunications suppliers have been removed not only in more developed countries such as Singapore and Thailand, but also in Cambodia, Laos PDR and Myanmar.¹³²

¹²⁶ For a background on logistics issues in CLMV, see Ruth Banomyong, “Logistics Challenges in Cambodia, Lao PDR, Myanmar and Vietnam”, in “A Study on Upgrading Industrial Structure of CLMV Countries” (eds. Ruth Banomyong and Masami Ishida), ERIA Research Project Report 2009-7-3 (2010), available at: http://www.eria.org/publications/research_project_reports/a-study-on-upgrading-industrial-structure-of-clmv-countries.html.

¹²⁷ Banomyong, pp. 409-410.

¹²⁸ Banomyong, p. 410.

¹²⁹ MIDA, *Logistics Services* booklet, pp. 8-9.

¹³⁰ It has been suggested elsewhere that investment incentives should be harmonised, to avoid a conflict in trade and investment policies; see Myrna S. Austria, “The Philippines and the AEC Beyond 2015: Managing Domestic Challenges”, *Journal of Southeast Asian Economies*, Vol. 32, No. 2, August 2015, pp. 220-238, at p. 234. The same author suggests that investment promotion and facilitation be centralised under one agency (at same page).

¹³¹ See ASEAN Secretariat, <http://agreement.asean.org/home/index/10.html> (accessed on 20 July 2017).

¹³² “ASEAN Services Integration”, ASEAN Secretariat and World Bank (2015), pp. 60-62.

E-Commerce-related Foreign Investment Restrictions

Example: Indonesia

In May 2016, Indonesia amended its foreign investment restrictions for e-commerce to permit up to 49% foreign ownership,¹³³ as shown in Table 8 below.

TABLE 8: Examples of Foreign Investment Restrictions in E-commerce

ASEAN Priority Sector Affected	Examples of Related Investment Barriers	Restriction
E-Commerce	Electronic commerce transaction providers (platform-based market place, daily deals, price grabber, online classified advertising) with an investment value of less than IDR100,000,000,000	Maximum 49% Foreign Capital ownership ¹³⁴
	Retail sale through mail order and internet	Reserved for SMEs ¹³⁵
	Retail business for any kind of product via electronic system (e.g. liquor)	100% Domestic Capital requirement ¹³⁶
	E-payment service companies (November 2016) ¹³⁷	Bank Indonesia licensing requirements for e-payment service providers, and for e-wallet service providers with at least 300,000 users Also, may require registration as <i>Perseroan Terbatas</i> (with 80% ownership by an Indonesian

¹³³ Presidential Regulation No. 44 of 2016, 12 May 2016 (text in English available at: <http://www5.bkpm.go.id/en/investment-procedures/negative-investment-list>) (accessed on 23 July 2017), amending the position in the previous Negative List in Presidential Regulation 39/2014. See generally, <http://www.lhrplaw.com/news-19-The-New-Indonesian-Negative-List-Investment--Presidential-Regulation-No.-44-of-2016.html>.

¹³⁴ Presidential Regulation No. 44 of 2016.

¹³⁵ Presidential Regulation No. 44 of 2016.

¹³⁶ Presidential Regulation No. 44 of 2016.

¹³⁷ Bank Indonesia Regulation No. 18/40/PBI/2016. See also <http://www.reuters.com/article/indonesia-investment-regulations-idUSL4N1DG271> (accessed on 23 July 2017).

	citizen or entity) in certain cases.
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C. Financial Services Restrictions

ASEAN member States have been negotiating to progressively liberalise investment regulation of financial services under the ASEAN Framework Agreement on Services (AFAS). These liberalisation actions are separate from the investment liberalisation actions under the ACIA.

In the most recent round of negotiations in 2016, improved access in financial access can be found in the Protocol to Implement the Seventh Package of Commitments on Financial Services under the ASEAN Framework Agreement on Services.¹³⁸ The following are some examples of restrictions which remain, for foreign investors.

Example: Thailand

In 2016, The Thai Ministry of Commerce removed certain requirements for foreign commercial banks, bank branches and life insurance, property and casualty insurance companies to operate in Thailand.¹³⁹ However, some specific legal requirements (such as foreign ownership of equity) still exist.¹⁴⁰

D. Infrastructure

Apart from the Priority Integration Sectors, infrastructure is an important area of focus in the AEC.¹⁴¹ Yet, a number of investment restrictions remain in relation to services that are essential to building ASEAN infrastructure and connectivity, whether physical or virtual.¹⁴²

The following are examples of construction and telecommunication investment restrictions as at July 2017.

¹³⁸ Hanoi, Vietnam, 23 June 2016, in force from 20 December 2016.

¹³⁹ Ministerial Regulation Prescribing Service Business Not Requiring Foreign Businesses License (No. 2) B.E. 2559 (2016). See also report, "Four Businesses to be Removed from FBA Annex III", 11 November 2015, *The Nation*, at: <http://www.nationmultimedia.com/business/Four-businesses-to-be-removed-from-FBA-Annex-III-30272647.html> (accessed on 23 July 2017).

¹⁴⁰ See for example, section 16 of the Financial Institutions Businesses Act 2008, B.E. 2551(2008); https://www.bot.or.th/English/AboutBOT/LawsAndRegulations/SiteAssets/Law_E24_Institution_Sep2011.pdf (unofficial English translation, accessed on 23 July 2017).

¹⁴¹ See AEC Blueprint 2025, ASEAN MPAC 2025 and "ASEAN Investment Report 2015, Infrastructure Investment and Connectivity", at <http://asean.org/storage/2016/09/ASEAN-Investment-report-2015.pdf> (accessed on 23 July 2017). Meeting ASEAN's infrastructure needs will help facilitate regional connectivity, which can in turn facilitate trade and investment in the region.

¹⁴² See generally, ASEAN, http://asean.org/?static_post=foreign-equity-policies (accessed on 23 July 2017).

Examples:

Brunei

Under the Protocol to Implement Ninth Package under AFAS (2015), Brunei has committed to open foreign equity participation **up to 55%** for integrated engineering services (transportation infrastructure turnkey services, water and sanitation supply works, construction of manufacturing turnkey projects and other turnkey projects, and various construction- and engineering-related services. It therefore reserves the right to maintain such maximum foreign equity requirement in its laws.

Indonesia

Infrastructure-related services are subject to a number of foreign investment restrictions. These include the following.¹⁴³

- Construction services (construction contractors) with simple and medium technology and/or small and medium risks and/or work value of up to IDR 50,000,000.000 are **reserved for SMEs**.
- Business services and Construction consultancy services “with simple/medium technology and/or small/medium risks and/or value less than IDR 10,000,000,00” are **reserved for SMEs**.
- Construction of electric power – **maximum 95% foreign capital**.
- Construction service (construction implementation service) using advanced technology and/or high risk and/or the work value is more than IDR 50,000,000,000 (CPC 511, 512, 513, 514, 515, 516, 517, and 518) and Business service / Construction consultant service using advanced technology and/or high risk and/or the work value is more than IDR 10,000,000,000 (CPC 8671, 8672, 8673, 8674, and 9403)
 - **Foreign capital ownership: Max.67%.**
 - **Foreign capital ownership by ASEAN countries’ investors: Max.70%.**

¹⁴³

Presidential Regulation Number 44 Year 2016 Concerning Lists of Business Fields that are Closed to and Business Fields that are Open with Conditions to Investment, containing Indonesia’s Negative List. See also OECD, “Economic Outlook for Southeast Asia, China and India 2016 – Enhancing Regional Ties”, p. 64, on impediments to infrastructure in Indonesia.

Thailand

Thailand generally restricts foreign capital ownership in several important services to a maximum of 49%. Architectural, construction and engineering services – all relevant to infrastructure development - fall within this restriction category.¹⁴⁴

Viet Nam

Foreign investment in six “conditional sectors” require approval and include maximum foreign capital ownership restrictions.

Projects which require Prime Ministerial approval include those in telecommunication network infrastructures, broadcasting, provision of telecommunications and internet services, construction and operation of river ports, sea ports, airports, and transportation of goods and passengers by railway, airway, road, sea, inland waterway and projects having investment capital of more than VND5,000 billion (USD233 million).¹⁴⁵

In late 2016, the Government proposed the removal of restrictions on a number of conditional sectors.¹⁴⁶ In July 2017, the Vietnamese Prime Minister indicated an intention to remove investment restrictions in certain areas such as finance, banking and telecommunications services and this is therefore an important area to monitor.¹⁴⁷

Information on “conditional business activities” is to be set out in the *National Enterprise Registration Portal*, but at the time of access, the site was only available in Vietnamese.¹⁴⁸

¹⁴⁴ Foreign Business Act 1999 B.E. 2542, List 3, available at: <http://library.siam-legal.com/thai-law/foreign-business-act-types-of-businesses-list-3/> (accessed on 23 July 2017). These are subject to exemptions and to FTA liberalisation measures. In the case of construction services they are subject to the following specific exceptions:

1. Construction of structures for delivery of infrastructure public services in the sphere of public utilities or transportation requiring the use of special apparatuses, machines, technology or expertise, with the minimum capital of five hundred million Baht or upwards from foreigners;
2. Construction of other types as prescribed in the Ministerial Regulation.

¹⁴⁵ Law on Investment 2014, Law No. 67-2014-QH13, Appendix 4, and Decree 118/2015/ND-CP was issued on November 12th 2015; for unofficial English translations of the documents, see <http://www.antlawyers.vn/library/law-on-investment-2014.html> and <http://www.antlawyers.vn/legal-service/decree-1182015nd-cp-guiding-the-investment-law-2014.html> (accessed on 23 July 2017).

¹⁴⁶ See “Ministry to Propose 67 Conditional Business Lines to be Permitted”, 9 September 2016, at: <https://www.talkvietnam.org/2016/09/ministry-to-propose-67-conditional-business-lines-be-permitted/> (accessed on 23 July 2017). The Government is also developing a website to list the restricted lines of business to increase transparency and facilitate investment.

¹⁴⁷ See report, “VN vows to lift restrictions to facilitate foreign investors: PM Phú”, Viet Nam News, 11 July 2017, at <http://vietnamnews.vn/politics-laws/379891/vn-vows-to-lift-restrictions-to-facilitate-foreign-investors-pm-phuc.html#iRhfvDL1jTPmhX7v.99> (accessed on 23 July 2017).

¹⁴⁸ See Portal at: <https://dangkykinhdoanh.gov.vn/HelpAndSupport/tabid/93/ArticleID/291/Ho-tro.aspx> (accessed on 12 July 2017; English language icon not operational).

Infrastructure PPP Laws and Regulations

While ASEAN has a set of PPP guidelines for member States,¹⁴⁹ ASEAN domestic regulation on private-public partnership arrangements (PPP) is uneven for the reasons shown below.

As at July 2017, most ASEAN member States have laws, regulations or at least guiding documents addressing PPP arrangements.¹⁵⁰ However, there appears to be a lack of clarity in some of these.¹⁵¹

Apart from clear laws and regulations to allow foreign investors to participate confidently in PPP projects in ASEAN, the general regulatory environment, transparency of government procurement processes and the rule of law are important as well.¹⁵²

Preliminary Recommendations

The team recommends the following:

- Accelerate liberalisation in a Priority Cluster of services (such as e-commerce, logistics, financial and infrastructure-related services) to allow ASEAN businesses to better participate in GVCs.¹⁵³

¹⁴⁹ See ASEAN, at: <http://asean.org/storage/2016/09/Public-Private-Partnership-in-South-East-Asia.pdf>.

¹⁵⁰ See *ibid.*, Table 7. See country regulatory information in “National Public-Private Partnership Framework in ASEAN Member Countries”, ERIA, September 2015, at: http://www.eria.org/publications/research_project_reports/national-public-private-partnership-framework-in-asean-member-countries.html (accessed on 23 July 2017). For an example of recent legislative action see Vietnam, <http://www.mpi.gov.vn/en/Pages/tinbai.aspx?idTin=36970&idcm=133> (accessed on 23 July 2017). Vietnam, for example, issued a specific Decree on PPP Investment Forms in 2015; see Decree No. 15/2015/ND-CP and related documents.

¹⁵¹ See for example, Satoshi Shimizu, “Issues Affecting the Increased Use of Public-Private Partnerships (PPPs) in Infrastructure Development in Asia”, Pacific Business and Industries Vol. XVI, 2016 No. 60, at pp. 15-16 and 20-21, available at: <https://www.jri.co.jp/MediaLibrary/file/english/periodical/rim/2016/60.pdf> (accessed on 23 July 2017). See also <http://www.bmiresearch.com/articles/asia-ppp-market-still-needing-development> and UNESCAP, at: <http://www.unescap.org/sites/default/files/1b%20-%20WB%20-%20Leveraging%20private%20finance%20through%20dvlp%20banks%2C%20the%20Global%20Infrastructure%20Facility%20%28GIF%29.pdf> (accessed on 23 July 2017).

¹⁵² See “Hand in Hand”, 3 September 2014, *Southeast Asia Globe*; <http://sea-globe.com/infrastructure-focus-asean/> (accessed on 23 July 2017). See also generally, See D.3, AEC Blueprint 2025, and Imelda Deinla, “The Development of the Rule of Law in ASEAN – The State and Regional Integration”, Cambridge University Press (2017), especially Chapters 6 and 7.

¹⁵³ Note that Article 3(3)(g) of the ACIA allows ASEAN member States to add other sectors to the liberalisation plan of the ACIA.

- Facilitate investments in such a Priority Cluster.
- Facilitate investments by AEOs and MSMEs.
- Provide greater clarity in PPP laws, policies and implementation.

E. Investment Facilitation and Regulatory Connectivity

During the team’s Manila Roundtable, the investment facilitation programme under the ACIA was highlighted by a participant as being a useful platform to harmonise investment laws in ASEAN.

The following summarises feedback from businesses gathered at the Ho Chi Minh City Roundtable, which points to a need for investment facilitation.

“Too many laws.”

“Even Vietnamese lawyers have to constantly update themselves”;

“Often, there are many matters that require consulting with the authorities even before submission of applications for clients. The answer is not written in any specific law – it is necessary to be guided by regulators. There are various regulators in Vietnam.”

“There are too many conditional sectors.”

While the ACIA contains language on investment facilitation and enhancing economic integration through investment-related initiatives, such language is weak as it requires that member States “shall endeavour” to take certain steps.¹⁵⁴ The contrast with the much more detailed and stronger provisions in the ATIGA for trade facilitation is marked.¹⁵⁵

Preliminary Recommendations

Two possible steps to advance investment facilitation are:

- development of a parallel ASEAN framework and work programme for investment facilitation, drawing lessons from the framework and principles in ASEAN trade facilitation for trade in goods; and
- sharing of best practices in investment regulation. This entails increasing regulatory connectivity among ASEAN regulators and law-makers who work

¹⁵⁴ See Articles 25 and 26, ACIA.

¹⁵⁵ See Chapter 5, ATIGA.

in investment law-making. The ASEAN Guide on Good Regulatory Practice (GRP) is a good starting point. While it contains general and goods-related regulation practices, it does not address investment-specific regulation practices.

SECTION 4 LAND USE BARRIERS

Overview

As land is a limited, valuable resource, countries will seek to regulate the rights relating to the land situated in their territories. Restrictions on land rights are a means to many ends, including differentiating between protected and promoted sectors; ensuring sustainable exploitation of natural resources; and implementing environmental conservation policies. Unduly restrictive or unwieldy laws or processes on acquisition and protection of land rights will, however, make the country less competitive in attracting foreign direct investment. ASEAN member States must work on striking a balance between business facilitation and monitoring.

The team extracted and compiled the relevant data from World Bank's Ease of Doing Business Report (DB World Bank 2017)¹⁵⁶ to provide a quick overview of the processes and systems relating to land rights acquisition and protection in ASEAN.

Efficiency, Time and Costs of Property Registration

Table 9 shows the general efficiency of ASEAN legal systems in property registration. On the ranking of 190 economies in respect of ease of registering property in the DB World Bank 2017,¹⁵⁷ five ASEAN member States are placed in the lower half of the table:

Table 9: Efficiency of Legal System in Property Registration in ASEAN

ASEAN Member States	Rank	No. of Procedures	Time (Days)	Cost (% of property value)
Singapore	19	6	4.5	2.9
Malaysia	40	8	13	3.4
Vietnam	59	5	57.5	0.6
Lao PDR	65	4	53	1
Thailand	68	4	6	7.4
Philippines	112	9	35	4.3
Indonesia*	118	5	25	10.9
Cambodia	120	7	56	4.3
Brunei Darussalam	134	6	298	0.6
Myanmar	143	6	85	5.1

Source: Compiled from DB World Bank 2017

*Indonesia has risen from rank 123 (DB 2016 Rank) to rank 118 (DB 2017 Rank)

¹⁵⁶ Rankings are benchmarked to June 2016.

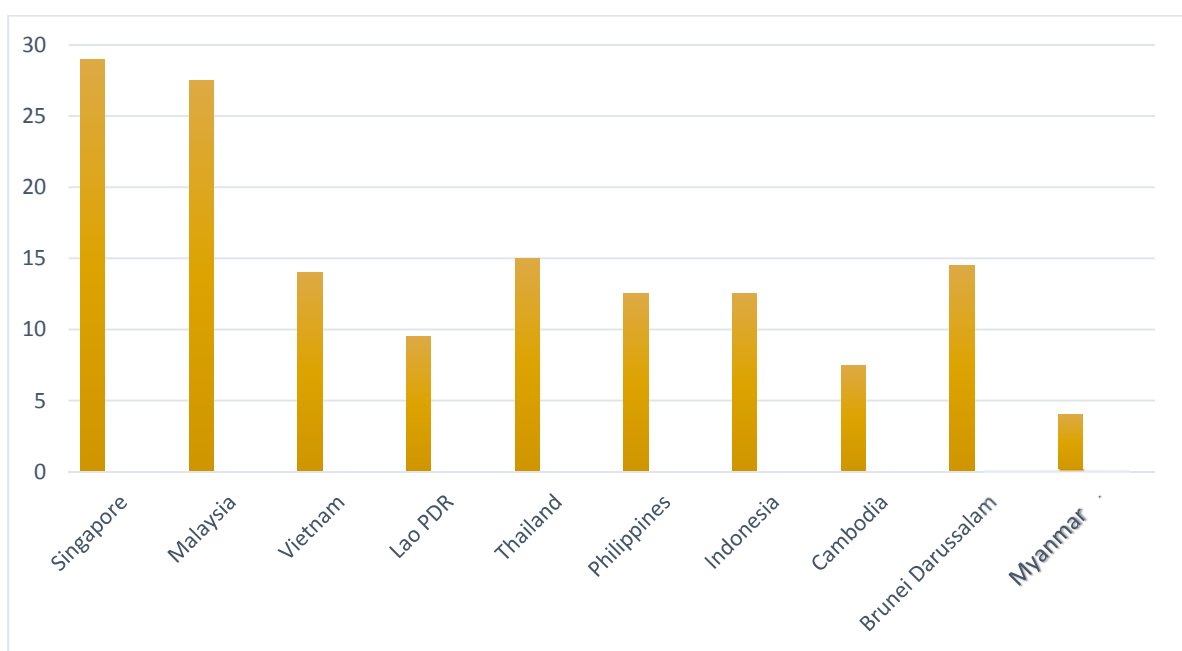
¹⁵⁷ <http://www.doingbusiness.org/rankings> (accessed on 23 June 2017).

Quality of Land Administration

Chart 11 below shows the World Bank's 2017 rating of the quality of the land administration in the different ASEAN member States. The quality index (0-30) is calculated based on the following considerations:

- (i) Reliability of infrastructure index;
- (ii) Transparency of information;
- (iii) Geographic coverage;
- (iv) Land dispute resolution; and
- (v) Equal access to property rights.

Chart 11: Quality of the Land Administration Index (0-30)



Source: Compiled from DB World Bank 2017

Digitisation and Electronic Databases

Table 10 below extracts from DB World Bank 2017 information relating to the digitisation of title records and availability of electronic databases concerning land rights in ASEAN. The level of digitisation of the relevant information is key to organising an orderly land title record system as well as enabling/facilitating ready access to information concerning land rights and land development.

Table 10: Digitisation of Title Records and Electronic Databases in ASEAN

ASEAN Member State	Majority of title records: paper or computerised?	Electronic database for checking encumbrances?	Electronic database for recording boundaries, checking plans and providing cadastral information?
Singapore	Computer/fully digital	✓	✓
Malaysia	Computer/fully digital	✓	✓
Vietnam	Computer/scanned	✓	✓
Lao PDR	Paper	X	X
Thailand	Paper	X	X
Philippines	Computer/scanned	X	X
Indonesia	Paper	X	✓
Cambodia	Paper	X	X
Brunei Darussalam	Paper	X	✓
Myanmar	Paper	X	X

Source: Compiled from DB World Bank 2017

Transparency of Information relating to Acquisition of Rights

Table 11 shows data compiled from DB World Bank 2017 relating to the availability of information concerning acquisition of land rights. The ease of obtaining such information makes acquisition of land rights less tedious and costly. It also boosts investors' confidence in the transparency of the process.

The data relates to the following questions considered by the DB World Bank 2017:

- (i) Who is able to obtain information on land ownership at the agency in charge of immovable property registration in the largest business city?
- (ii) Is the list of documents that are required to complete any property transaction made publicly available—and if so, how?

- (iii) Is the applicable fee schedule for any property transaction at the agency in charge of immovable property registration in the largest business city made publicly available—and if so, how?

Table 11: Information relating to Land Ownership, List of Documents and Fees

ASEAN Member State	Who can obtain information on land ownership?	Is list of documents required to complete any property transaction publicly available?	Is the fee schedule for any property transaction made publicly available?
Singapore	Anyone who pays the official fee	✓ Online	✓ Online
Malaysia	Anyone who pays the official fee	✓ Online	✓ Online
Vietnam	Anyone who pays the official fee	✓ On public records	✓ On public records
Lao PDR	Only intermediaries and interested parties	✓ In person	✓ On public records
Thailand	Only intermediaries and interested parties	✓ Online	✓ Online
Philippines	Anyone who pays the official fee	✓ Online	✓ Online
Indonesia	Anyone who pays the official fee	✓ Online	✓ Online
Cambodia	Only intermediaries and interested parties	✓ In person	✓ Online
Brunei Darussalam	Anyone who pays the official fee	✓ Online	✓ In person
Myanmar	Anyone who pays the official fee	✓ Online	✗

Source: Compiled from DB World Bank 2017

Survey Findings

In this segment of the survey, respondents were asked a series of questions to help us understand the kind of obstacles they encountered in respect of acquisition of land rights¹⁵⁸ in the ASEAN countries. Of the total completed survey responses received, only five respondents indicated that they have encountered obstacles in the acquisition of land rights in ASEAN countries.

These five respondents operate in a wide range of industries.¹⁵⁹ Of the five, only four respondents expressly indicated that they have acquired interests or rights in land in one or more of the ASEAN member States. The remaining respondent did not give any indication but proceeded to answer other questions.

Barriers Encountered relating to Acquisition of Land Rights

A key question in the survey asked the respondents to identify the barriers that they experienced at the stage of acquiring land rights, by choosing from a fixed list of responses (see barriers set out in Table 12 below).

The respondents were then asked to rate the level of difficulty, on a scale of 1 to 5 (5 being the most difficult), for each barrier encountered. By way of an overview, the five respondents, between them and not by any one alone, have encountered all the barriers set out below.

Table 12: Barriers Encountered relating to the Acquisition of Land Rights

Barriers	Mean difficulty level (0-5)
Legal restriction on duration	3.75
Legal restriction on size of land	2.6664
Legal restriction on direct acquisition of the land rights by a foreign company	3.6667
Unclear laws/policies on the acquisition of land rights	3.6667
Absence of or lack of access to the governments' master plan and/or policies on land use and development	3.3334

¹⁵⁸ Including land ownership, leasehold interest and other land use rights.

¹⁵⁹ Including power and renewables, oil and gas, education, infrastructure, telecommunications, healthcare, financial services, information technology, customer services and consultancy.

Absence of or lack of access to a centralised and reliable register or database on land titles and other parties' existing land rights	3.6663
Intermediary/middle men issues	3
Impact of legal obstacles on financing issues	2.3331

One respondent provided qualitative observations on the barriers encountered.

Barriers	Observations
Legal restriction on direct acquisition of the land rights by a foreign company	Restriction on foreign ownership in Myanmar and Indonesia is “problematic for large scale industrial real estate investment” and such a legal hurdle in turn results in prevalent workarounds that are “problematic”. ¹⁶⁰
Absence of or lack of access to the governments' master plan and/or policies on land use and development	The government's master plan and/or policies for land use and development is “critical to investor due diligence” but these are not available in “several developing markets”. ¹⁶¹

Post-acquisition Barriers

Three respondents indicated that they encountered further barriers post-acquisition of the land rights. They were asked to identify the barriers encountered from a fixed list:

- (i) Government compulsory acquisition
- (ii) Land use/zoning issues
- (iii) Issues in relation to transfer to another party
- (iv) Others

¹⁶⁰ The respondent did not go on to explain what these workarounds are and in what ways they are problematic.

¹⁶¹ The respondent did not go on to identify these developing markets. However, the respondent indicated in its survey response that it acquired land rights in Thailand, Vietnam, Myanmar and Indonesia.

Two respondents indicated that they encountered obstacles (i) to (iii); one respondent indicated that it encountered all obstacles but the difficulty level was rated to be of the minimum level.

Existing Literature / Reports

This part of the report summarises the barriers identified in existing literature and reports. The survey responses reflect some of these barriers.

The barriers highlighted below are primarily for illustrative and indicative purposes. They are not meant to be a comprehensive and authoritative summary of the current state of law on land rights in the respective ASEAN countries. If no references are made to the existence of particular barriers in certain countries, it does not necessarily follow that no such barriers exist.

(i) Cumbersome and Costly Processes

Cambodia

The Cambodian land title system has been described as “cumbersome, expensive, and subject to corruption”, notwithstanding the Cambodian government’s efforts to speed up the issuance of titles.¹⁶²

Indonesia

The cost of land permits is high.¹⁶³ Secondly, the process for obtaining these permits is described to be “arduous”.¹⁶⁴ The infrastructure development in Indonesia is also reported to suffer from “the lack of a solid land-acquisition framework”.¹⁶⁵

¹⁶² See <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254269> (accessed on 22 June 2017). The 2001 Land Law establishes a system for recording titles and ownership in land.

¹⁶³ See “The ASEAN Advantage: Exploring Canada’s Trade Potential” (2016) p 44, a joint report by The Asia Pacific Foundation of Canada, the Canada-ASEAN Business Council, the Business Council of Canada, and the University of British Columbia. The issue of high cost has also been noted recently in Sindi Paramita, “Analysis: Obstacles in Indonesian property sector” *The Jakarta Post* (20 July 2016): <http://www.thejakartapost.com/news/2016/07/20/analysis-obstacles-indonesian-property-sector.html> (accessed on 23 July 2017). According to this commentary, “[i]nvestors have found it hard to obtain a plot of land ready for development at a reasonable price and this has triggered high costs in project development”.

¹⁶⁴ *The ASEAN Advantage Report 2016*, p. 44.

¹⁶⁵ Investment Climate Statements for 2016 – Indonesia: <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254281> (accessed on 22 June 2017).

Philippines

The property registration process has been described as “tedious and costly”.¹⁶⁶

(ii) Inadequate Title Record Management

Philippines

The title record management is described as “weak” as a result of insufficient funding and lack of trained personnel.¹⁶⁷

(iii) Uncertainty of Land Rights

A number of factors can contribute to the uncertainty in land rights. In ASEAN countries, instances of land acquisition have led to disputes involving local farmers. Inadequate title record system and non-standardisation of proof of title are other factors affecting the certainty of land rights.

Cambodia

The “Investment Climate Statements 2016 – Cambodia” notes that land rights are “a contentious issue” in Cambodia, in part owing to the fact that most land rights holders do not have the relevant legal documentation of their rights as a result of the official policies and social upheaval during the era that the Khmer Rouge was in power.¹⁶⁸ Even though there is now a land title record system established under the 2001 Land Law, title records are not issued efficiently. Further, even where there is title record, it did not appear to satisfy judges in some court cases, and additional proof was demanded of the rights holders. Standardisation in title recognition is thus a matter that needs to be addressed under Cambodian law.

Indonesia

It has recently reported that investors are of the view that land ownership under Indonesian law is uncertain—there have been cases where land ownership held for years has come under challenge in litigation.¹⁶⁹

¹⁶⁶

<http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254309> (accessed on 23 June 2017).

¹⁶⁷

<http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254309> (accessed on 23 June 2017).

¹⁶⁸

<http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254269> (accessed on 22 June 2017).

¹⁶⁹

Sindi Paramita, “Analysis: Obstacles in Indonesian property sector” *The Jakarta Post* (20 July 2016): <http://www.thejakartapost.com/news/2016/07/20/analysis-obstacles-indonesian-property-sector.html> (accessed on 23 July 2017).

Myanmar

In respect of Myanmar, the ASEAN Investment Report 2017¹⁷⁰ comments that there is a need to make “legal changes to land laws to give farmers secure rights to their land and the ability for them to choose which crops they grow”.¹⁷¹

Lao PDR

In Lao PDR, it is observed that beyond urban areas, rights to land are unclear and made complex by the continuing practice of communal titling in some areas.¹⁷² In fact, the government’s efforts in changing existing land policy has been impeded by “sensitive issues including community-held land rights, traditional land rights, slash-and-burn or “shifting cultivation,” and a history of expropriation for infrastructure, mining, and power projects”.¹⁷³

Thailand

The “Investment Climate Statements 2016 – Thailand” notes that the US Embassy in Thailand received reports of “conflicts over land title authenticity in areas that the government has designated as national park land”.¹⁷⁴

¹⁷⁰ The ASEAN Investment Report 2017, available at: <http://asean.org/storage/2017/01/Investing-in-ASEAN-2017-.pdf> (accessed on 22 June 2017).

¹⁷¹ The ASEAN Investment Report 2017, p. 77. The problem arises in part owing to the fact that laws in Myanmar are unclear or difficult to access: see generally J Beyer “Finding the Law in Myanmar” (2015) 31 Anthropology Today 3.

¹⁷² The “Investment Climate Statements 2016—Lao PDR”: <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254291> (accessed on 23 June 2017). Regarding communal titling, see more generally Ian G Baird, “Indigenous Peoples’ and land: Comparing communal land titling and its implications in Cambodia and Laos” (2013) 54 Asia Pacific Viewpoint 269. Regarding conflicts between indigenous people and investors, see, for example, Chris Hufstader, “Defending Land and Life in Cambodia” (23 May 2016): <https://closeup.oxfamamerica.org/stories/defending-land-and-life-cambodia>.

¹⁷³ The “Investment Climate Statements 2016—Lao PDR”: <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254291> (accessed on 23 June 2017).

¹⁷⁴ <https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm#wrapper> (accessed on 22 June 2017).

(iv) *Restriction on Ownership, Transfer of Rights and Extension of Licences*

Brunei Darussalam

In Brunei, there are complaints of non-transparency of the Brunei Land Department's policies and the general difficulties of transferring land even amongst Brunei citizens.¹⁷⁵ Under the laws of Brunei Darussalam, foreigners are not allowed to own land and can only acquire long-term leases. The prevalent workaround appears to have been to conduct proxy land sales to foreigners through the use of powers of attorney and trust deeds.¹⁷⁶ However, amendments to the Brunei Land Code have been introduced in 2016 to ban such proxy land sales and convert existing land ownership through powers of attorney and trust deeds into 60-year leases.¹⁷⁷

Viet Nam

Under Vietnamese law, the Housing Law 2014 and the Real Estate Business Law 2014,¹⁷⁸ which took effect on 1 July 2015, introduced landmark reforms to the "land use rights" that foreign investors may acquire.¹⁷⁹ Nevertheless, it was noted in the "Investment Climate Statements for 2016 — Vietnam" that investors continue to encounter other barriers. For instance, they found it difficult to amend investment licenses to expand their business operations onto neighbouring land. It was also observed that local authorities "may intend to" increase the renewal requirements for land use rights, especially in cases where there are Vietnamese competitors in the relevant sector.¹⁸⁰

¹⁷⁵ *The Report: Brunei Darussalam 2013*, p 198. It is noted that "it can take several years to obtain notification from the Land Department as to whether or not a property transfer may take place".

¹⁷⁶ The "Investment Climate Statements 2016—Brunei Darussalam": <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2017&dliid=269801> (accessed on 25 July 2017). See also *The Report: Brunei Darussalam 2013*, p 198.

¹⁷⁷ See the Land Code (Amendment) Order, 2016: http://www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2016/EN/S037.pdf (accessed 23 June 2017). See also the "Investment Climate Statements 2016—Brunei Darussalam": <https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm#wrapper> (accessed on 23 June 2017); *The Report: Brunei Darussalam 2014*, p 142.

¹⁷⁸ <http://vietnamlawenglish.blogspot.sg/2014/11/vietnam-real-estate-trading-law-2014.html> (accessed on 22 June 2017).

¹⁷⁹ See commentary: <http://www.vilaf.com.vn/en/news-a-legal-updates/news/391-vietnams-new-law-on-housing.html> (accessed on 23 June 2017).

¹⁸⁰ <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254329> (accessed on 23 June 2017)

(v) *Inefficient / Ineffective Resolution of Land Disputes*

Cambodia

There are sentiments that the Cambodian government has not “effectively and fairly resolved land rights claims” arising out of the grant of economic land concessions under Cambodian law.¹⁸¹

Myanmar

The fears of land battles also resonate with investors and potential investors in the Myanmar economy. It is reported in the *Financial Times* that land battles, including land-grabbing and disputes in ownership,¹⁸² constitute “one of the most significant risks identified by businesses coming in”.¹⁸³

Philippines

In Philippines, it has been observed that “[c]orruption is...prevalent among land administration personnel and the court system is slow to resolve land disputes”.¹⁸⁴

Viet Nam

It has been noted that there are “many outstanding legal disputes between land owners and local authorities” and foreign investors may become exposed to these disputes when they acquire shareholding in a local company.¹⁸⁵

(vi) *Uncertain Compulsory Acquisition Laws and Processes*

In this part, compulsory acquisition laws are considered from the perspective of protecting foreign investors’ investments. Whilst compulsory acquisition laws are a

¹⁸¹ See the “Investment Climate Statements 2016—Cambodia”: <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254269> (accessed on 22 June 2017).

¹⁸² These problems arise as a result of the introduction of land policy reforms without consulting the wider society (including the farmers) or taking into account customary land use practices. See Stephen McCarthy, “Land Tenure Security and Policy Tensions in Myanmar (Burma)” *Asia Pacific Issues* No 127 (October 2016): <http://www.eastwestcenter.org/publications/land-tenure-security-and-policy-tensions-in-myanmar-burma> (accessed on 23 June 2017).

¹⁸³ Michael Peel, “The Great Land Rush—Myanmar: The Dispossessed”, *Financial Times* (1 March 2016): <https://ig.ft.com/sites/land-rush-investment/myanmar/?mhq5j=e1> (accessed on 23 June 2017). See also *Myanmar Centre for Responsible Business Briefing Paper—Land* (March 2015): <http://www.myanmar-responsiblebusiness.org/pdf/2015-04-02-LAND-Briefing.pdf> (accessed on 23 June 2017).

¹⁸⁴ See the “Investment Climate Statements 2016—Philippines”: <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254309> (accessed on 23 June 2017).

¹⁸⁵ <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254329> (accessed on 23 June 2017)

necessary feature of the laws of any country, acquisition without fair and reasonable compensation, uncertain laws or the lack of a grievance procedure can cause foreign investors to lose confidence.

Lao PDR

Although there are laws protecting foreign assets and investments against expropriation save where it is necessary for a public purpose,¹⁸⁶ the term “public purpose” can be widely defined.¹⁸⁷ The “Investment Climate Statements for 2016 — Laos” notes that “[s]mall landholdings, land with unclear title, or land on which tax has not been paid is particularly at risk to expropriation”.¹⁸⁸

Philippines

The expropriation of land for public use in Philippines is contentious owing to uncertain laws and protracted judicial processes.¹⁸⁹ Although the laws of Philippines prescribe for compensation to foreign investors in the case of expropriation of property by the State for public use, in practice, it is observed that the process of arriving at a mutually agreeable price can be long-drawn in the Philippine courts.¹⁹⁰ The Philippine government passed the Republic Act No 10752 (also known as the “Right-of-Way Act”)¹⁹¹ on 7 March 2016 to facilitate the acquisition of right-of-way sites for state infrastructure projects.¹⁹² In particular, it lays down procedures (including court time lines where judicial proceedings are necessary¹⁹³) for payment of “just compensation” to land owners whose property has been expropriated. It remains to be seen if the legislation can effectively resolve the existing problems.

¹⁸⁶ See <http://www.laolandissues.org/wp-content/uploads/2013/11/Full-Policy-Recommendations-Eng4.pdf> (accessed on 23 June 2017). This report is produced by the Land Issues Working Group, a non-governmental organisation: <http://www.laolandinfo.org/about-us-2/who-we-are-2/> (accessed on 23 June 2017).

¹⁸⁷ See “Supporting Rationale for LIWG Recommendation: Defining standards for public purpose” Report, a copy is available here: <http://www.laolandissues.org/wp-content/uploads/2014/05/Standard-of-Public-Purpose---Rationale-for-Laos-and-International-Examples.-LIWG-2014.pdf> (Accessed on 23 June 2017).

¹⁸⁸ <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254291> (accessed on 23 June 2017).

¹⁸⁹ Raula J Palabrica, “New Expropriation Law” *Philippine Daily Inquirer* (21 March 2016): <http://business.inquirer.net/208827/new-expropriation-law> (accessed on 23 June 2017).

¹⁹⁰ See the “Investment Climate Statements 2016—Philippines”, see: <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254309> (accessed on 23 June 2017).

¹⁹¹ <http://www.officialgazette.gov.ph/2016/03/07/republic-act-no-10752/> (accessed on 23 June 2017).

¹⁹² For details, see description in Raula J Palabrica, “New Expropriation Law” *Philippine Daily Inquirer* (21 March 2016): <http://business.inquirer.net/208827/new-expropriation-law> (accessed on 23 June 2017).

¹⁹³ Section 6(3)(f) of the Republic Act No 10752 states that “[i]n the event that the owner of the property contests the implementing agency’s proffered value, the court shall determine the just compensation to be paid the owner within sixty (60) days from the date of filing of the expropriation case”.

Viet Nam

In Viet Nam, Article 5 of the Housing Law 2014 lays down the circumstances in which the State may purchase, commandeer or demolish housing on conditions of payment of compensation and implement policies for relocation of homeowners.¹⁹⁴ One such circumstance is where the land would be necessary for “socio-economic development” but it has been said that the term is “loosely-defined”.¹⁹⁵

(vii) Infrastructure-related Barriers

There have been complaints of inadequate infrastructure support for the development of sectors such as manufacturing. For example, the “The ASEAN Advantage: Exploring Canada’s Trade Potential” Report observed generally that a major barrier to the development of ASEAN manufacturing sector is “inefficiencies caused by poor infrastructure, including ports, roads, and rail networks”.¹⁹⁶ The report proposes the creation of special manufacturing zones with improved access (legal, administrative and technical) to invigorate regional trade in manufactured goods.¹⁹⁷

Indonesia

The rate of land acquisition for infrastructure projects has been described as “slow”.¹⁹⁸ There has been some improvement to the system nevertheless:

“The Law on Land Acquisition Procedures for Public Interest Development passed in December 2011 sought to streamline GOI acquisition of land for much-needed infrastructure projects. The law seeks to clarify roles, reduce the time frame for each phase of the land acquisition process, deter land speculation, and curtail obstructionist litigation, while still ensuring safeguards for land-right holders. The implementing regulations, first approved in 2012, went into effect on January 1, 2015; further revisions in 2015 expanded the scope of the new

¹⁹⁴ <http://vietnamlawenglish.blogspot.sg/2014/11/vietnam-housing-law-2014.html> (accessed on 23 June 2017).

¹⁹⁵ <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254329> (accessed on 23 June 2017)

¹⁹⁶ See “The ASEAN Advantage: Exploring Canada’s Trade Potential” (2016) p 47, a joint report by The Asia Pacific Foundation of Canada, the Canada-ASEAN Business Council, the Business Council of Canada, and the University of British Columbia. See also Section 3 on Infrastructure Services Restrictions.

¹⁹⁷ In Vietnam, many foreign investors consider it easier to implement investment projects in free trade zones because “they do not have to be involved in site clearance and infrastructure construction”. See the “Investment Climate Statements 2016—Vietnam”: <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254329> (accessed on 17 July 2017).

¹⁹⁸ See the “Investment Climate Statements 2016—Indonesia”, see: <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254281> (accessed on 17 July 2017).

provisions. Some reports indicate that the law has reduced land acquisition timelines; with no accusations of illegal GOI expropriation of land.”¹⁹⁹

Lao PDR

Poor transportation infrastructure has been noted to be a factor in slowing the growth and expansion of trade in Laos.²⁰⁰

Roundtable Findings

Feedback from Bangkok Roundtable

The following observations were made at the team’s Bangkok Roundtable.

Access to land use planning information

Difficult to access land use planning information.

Land use planning is the responsibility of the Ministry of Interior. A search on the internet, however, did not show that the Ministry of Interior has an official website. Nor does it appear that current land use planning information is available online.

In practice, investors will do best to seek help from the Board of Investment (“BOI”).²⁰¹

Feedback from Ho Chi Minh City Roundtable

The following feedback was gathered at the team’s Ho Chi Minh City Roundtable.

Industrial zones:

Industrial zones / industrial parks have ecosystems in place to assist investors to get set up and running right away. Licensing requirements are centralised through management boards, making it very convenient.

¹⁹⁹ See the “Investment Climate Statements 2016—Indonesia”, see: <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254281> (accessed on 17 July 2017). “GOI” refers to the Government of Indonesia.

²⁰⁰ See the “Investment Climate Statements 2016—Lao PDR”, see: <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dliid=254291> (accessed on 17 July 2017).

²⁰¹ <http://www.boi.go.th/index.php?page=index> (accessed on 23 June 2017).

Indirect expropriation:

In respect of investment, in all the Bilateral Investment Treaties, the Vietnamese government has committed to nationalise or expropriate investments in accordance with international standards.

The problem is indirect expropriation – very unclear concept.

Rate of compensation for expropriated land:

One important question for investors is land compensation for current residents on the land which investors intend to acquire land use rights.

The amount of compensation is dependent on negotiations with residents – general practice is to refer to market rate or the (non-binding) rates published by the government annually for public reference.

Preliminary Recommendations

Based on the team's preliminary findings set out above, there are three areas where ASEAN member States can work on:

- Enhancing access to information concerning acquisition of land rights;
- Establishing a uniform land titling system to enhance certainty and security of rights; and
- Clarifying and strengthening compulsory acquisition laws and processes.

In relation to the areas identified, ASEAN member States with more advanced systems can work with other States to achieve greater consistency in systems, processes and standards across ASEAN.

The team's recommendations for each of the three areas are set out below:

Enhancing access to information relating to land

- Introduce electronic databases for checking land ownership, encumbrances as well as boundaries and zoning matters. These databases should be made available online and accessible to anyone paying a fee.
- All procedures and fee schedules for conducting any type of property transaction should be available online for public access.
- Work towards an ASEAN portal for a consolidated database of the above information.

Establishing uniform land titling system and improving governance

- Accelerate systematic electronic land titling system;
- Put in place an efficient dispute resolution mechanism to resolve long running land rights disputes;
- Set up a taskforce to study non-communal land rights and communal land rights; and
- Provide education and training for government officers in charge of issuing land titles.

Clarifying compulsory acquisition laws and processes

- Clarify the meaning of key terms, and measures of compensation;
- Establish grievance procedures and dispute resolution mechanisms; and
- Set up an ASEAN working group to study best practices on compulsory acquisition laws and processes.

SECTION 5 DISPUTE SETTLEMENT BARRIERS

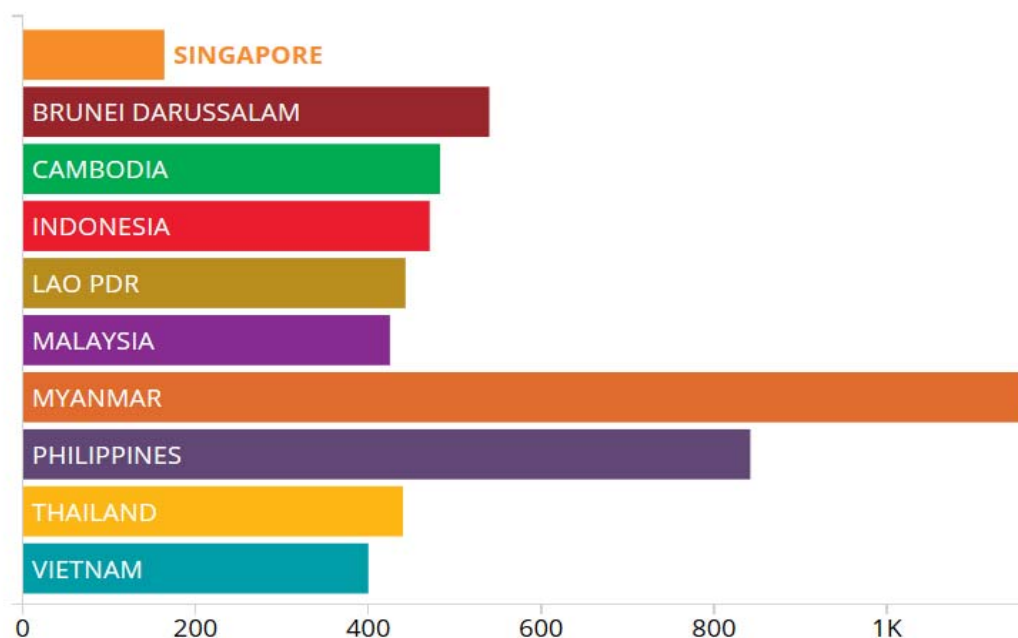
Time, Costs and Quality of Judicial Processes

Business costs can be exacerbated by legal processes encountered when dealing with disputes and enforcement of contracts. A number of factors affects the experiences – and costs incurred – when businesses seek to settle their disputes.

The time taken to enforce contracts and costs of such enforcement to claimants are factors which are relevant to businesses in ASEAN.

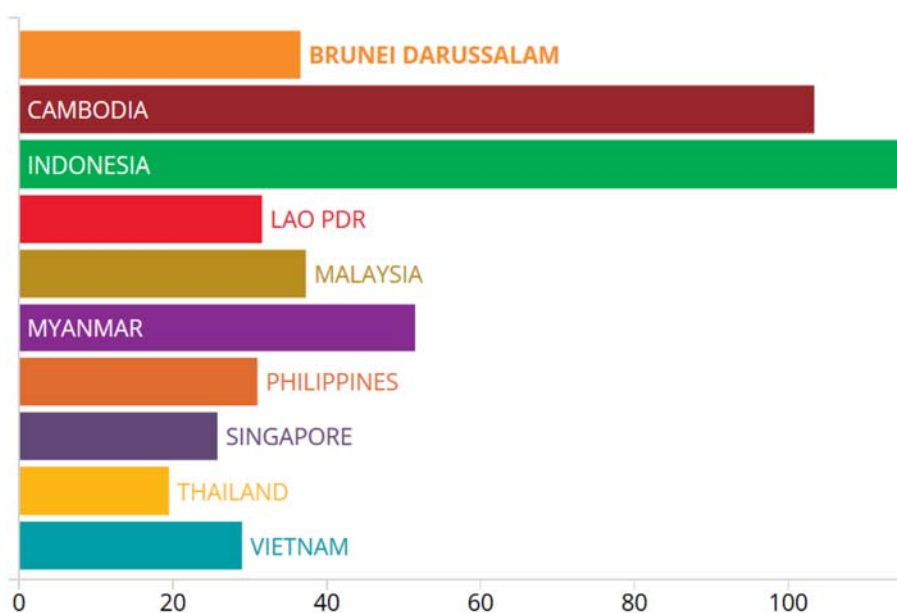
Charts 12 and 13 compare the time and costs of contract enforcement processes in ASEAN.

Chart 12: Time to Enforce Contracts (Days)



Source: World Bank (2017 data)

Chart 13: Costs of Enforcement (% of Claim)



Source: World Bank (2016 data)

Judicial systems can contribute to business costs. As one study put it:

“The channels through which judicial decisions may affect business behaviour are fairly straightforward and may be reduced to two: increased uncertainty and high costs.”²⁰²

The study also explained that the performance of the Philippines judicial system had been “thrown into the limelight as the business sector has in various surveys pointed to its performance as being one of the main obstacles and disincentives to doing business in the Philippines”²⁰³ and that high costs eat into businesses’ profitability.²⁰⁴

Businesses have a choice of resolving their disputes through litigation or other means. Where cross-border issues are involved parties may resort to methods such as arbitration and mediation, where they may prefer to settle disputes away from a particular court system.

²⁰² Sereno M. L. & Dios E. S. & Capuno J.J., “Justice and the Cost of Doing Business: The Philippines”, (2009) XLVI No. 1, *The Philippine Review of Economics*, pp. 35-86, at p. 36.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*, p. 37. See also the discussion of Philippine courts and recommendations in *Arangkada Philippines 2010: A Business Perspective*, December 2010, pp. 297-306.

Choice of Dispute Resolution Methods

Preliminary Findings

Based on the team's survey, **efficiency and costs** were the two top factors which respondents selected for their preferred dispute settlement methods. The preferences were also found not to have changed over the past 10 years for 100% of respondents.

The survey posed the following question:

"If your company has had any contract-related disputes in the past five years, what proportion involved only parties within ASEAN?"

63.64% of respondents had less than 50% of such disputes, suggesting that the majority of such disputes involved at least one non-ASEAN party.

On the other hand, **57.14%** of 14 respondents did not always include an arbitration clause in their contracts.

Among other questions on dispute resolution, the survey asked respondents whether there was any new body, legal procedure or database which they would like to see in ASEAN that could better facilitate their business operations and/or expansion in the region.

75% of respondents replied in the **negative**.

For those who replied in the **affirmative**, the further question posed was what type of database or body might be most useful. The responses are shown below.

ENGLISH DATABASE OF ALL ASEAN LAWS

Singled customs window; unified regulatory database

Central statistics organisation

The survey posed the following question, regarding an ASEAN-wide dispute resolution body: "**Would your company find it useful to have an ASEAN dispute resolution structure which specialises in hearing contract disputes between ASEAN businesses?**"

57.14% answered "No", with the following reasons being provided:

*We are an FI – we used the courts to enforce**
We deal mainly with our local representatives.

*We don't have many cases that would elevate (sic: elevate) to this point
SG is fine
All services in Singapore and SMC** can cater for our arbitration issues*

*FI – Financial Institution

** Presumably this refers to the *Singapore Mediation Centre*

For those who answered “Yes”, the following reasons were provided:

Although using services already available in Singapore would suffice.

One forum for ASEAN

Similar to Singapore International Commercial Court

It appears from the above responses that a **majority of respondents saw no need** for any new ASEAN-wide dispute resolution structure.

Roundtable and other Findings

Based on the team’s discussions, existing literature and reports, an unfamiliarity with international enforcement treaties and international arbitration law norms has been observed in certain systems.

Philippines

Feedback from Manila Roundtable

Participants shared the following views with the team.

While the Philippines Supreme Court had ‘promulgated’ specific rules on arbitration,²⁰⁵ it was observed that more judicial support for international arbitration was necessary.

Greater familiarity with international conventions such as the New York Convention was expressed as being important.

²⁰⁵ The research team followed up with research and found these in *Supreme Court En Banc*, A.M. No. 07-11-08-SC dated 1 September 2009.

Thailand

Feedback from Bangkok Roundtable

Thailand is not a signatory to any treaty on enforcement of foreign judgments.

Enforcement of a foreign judgment in Thai Courts is “very difficult”. In practice the courts may also not be sure on how to deal with foreign judgments.

For arbitral awards subject to the NYC, the public policy ground is “frequently invoked” to set aside such awards. It seems that the public policy ground is given wide interpretation in Thailand.

Thailand intends to consider the Hague Convention on Choice of Courts Agreement but it is “not likely to sign it in the near future”.

A perception of lack of support for arbitration and enforcement of arbitration awards has been expressed by some private-sector parties with respect to Thai courts.²⁰⁶

The **lack of enforceability of foreign judgments** in Thai courts was confirmed in the Bangkok Roundtable. In addition, it was observed that there was **uncertainty** in the enforcement of **arbitration awards** due to references to the ground of **public policy**.

Vietnam

Feedback from Ho Chi Minh City Roundtable

While Vietnam is a signatory to the NYC, Vietnamese judges may not be trained to handle enforcement cases related to the NYC.

Very few Vietnamese judges speak English.

There also appear to be NYC cases which have been reviewed by Vietnamese judges on their merits.

²⁰⁶

See for example, the practitioner views represented in “Thailand, Towards an Arbitration-Friendlier Jurisdiction?” (which refer to a case in which the Thai Intellectual Property and Trade Court enforced a New York Convention award in 2013), 8 January 2014, at: <http://www.lexology.com/library/detail.aspx?g=162fab61-b01a-4428-9ddf-c13a35c235cb>. Enforcement of arbitral awards is covered by the Thai Arbitration Act B.E. 2545 (2002).

There appears to a case in which a SOE party in an arbitration sued the arbitrator for damages and the (foreign) arbitrator is very concerned as to whether he should travel to Vietnam.²⁰⁷

Some present were not aware of the Hague Convention on Choice of Courts Agreement.

Lao PDR

The team found that in Lao PDR, it was relatively uncommon for businesses to use the courts to resolve their disputes. While businesses had expressed interest to hold arbitrations to resolve commercial disputes it appears that this is not necessarily available.²⁰⁸

Language and Contract Enforcement Issues

Indonesia

In *PT Bangun Karya Pretama Lestari v Nine AM*, the Indonesia Supreme Court affirmed a decision of the West Jakarta District Court, holding that for a contract to be enforceable under Indonesian law it must be in the Indonesian language. It applied Article 31 of the *Law No. 24 of 2009 regarding National Flag, Language, Emblem and Anthem of Indonesia*.²⁰⁹

Viet Nam

In Viet Nam, certain laws require contracts to be in Vietnamese. In addition, the 2015 Civil Procedure Code requires civil court proceedings to be conducted in Vietnamese

²⁰⁷ The research team followed up and confirmed that there is no arbitrator immunity under Vietnamese law: Art. 49(5) of the Law on Commercial Arbitration, No: 54-2010-QH12, provides as follows:

If an arbitration tribunal orders a different form of interim relief or interim relief which exceeds the scope of the application by the applicant, thereby causing loss to the applicant or to the Party against whom the interim relief was applied or to a third Party, then the Party incurring loss shall have the right to institute court Proceedings for compensation in accordance with the law on civil Proceedings.

See also K Minh Dang, Do Khoi Nguyen, Ian Fisher and Luan Tran, "Commercial Arbitration 2017 - Vietnam", para. 22, *Glob. Arb. Rev.*, 27 June 2017, at <http://globalarbitrationreview.com/jurisdiction/1004478/vietnam>.

"SOE" refers to state-owned enterprise.

²⁰⁸ Discussion by the team with a Lao PDR business chamber representative; notes of discussion on record kept by the team.

²⁰⁹ Supreme Court decision 601K/PDT/2015 dated 31 August 2015. See <http://www.lexology.com/library/detail.aspx?g=e2317dde-6fb4-4ece-a56b-8d51a8b62a25>, <http://www.hfw.com/Indonesian-language-in-contracts-November-2013>, and <http://blog.ssek.com/index.php/2014/01/court-annuls-loan-agreement-on-language-law-what-does-it-mean-for-your-agreements/>.

and evidentiary documents in foreign languages to be translated into Vietnamese, with notarisation or authentication.²¹⁰

Cambodia

Under the Cambodian Code of Civil Procedure, the official language of the Cambodian courts is Khmer. This means that official judgments will not be available in, for example, English.

Preliminary Recommendations

The team recommends the following as steps towards increasing judicial connectivity in ASEAN.

- a) Increase judicial connectivity and dialogue at all levels of courts in ASEAN on international law norms, cross-border trade issues, international arbitration law, international instruments on enforcement of cross-border judgments and arbitration awards;²¹¹ and
- b) Wherever possible, publication of commercial law judgments of member States' highest appellate courts in English, with online access.

²¹⁰ See Art. 20 and Art. 96.3 of the Law No. 91/2015/QH13. See <http://vietnamnews.vn/politics-laws/talking-law/298184/foreign-language-contract-laws-vary-in-vn.html#R9DM5WZOHq7uZ3iB.97>. A participant in the team's Manila Roundtable also expressed the view that the use of Vietnamese language for documents poses a barrier when due diligence activities have to be conducted by investors.

²¹¹ There are existing judicial exchange and capacity-building initiatives in ASEAN which may be built upon.

SECTION 6 SUMMARY OF KEY INTERIM FINDINGS AND PRELIMINARY RECOMMENDATIONS

Corporate Barriers

Interim findings

The following are major concerns raised by businesses in starting up and in continuing obligations in ASEAN:

- (i) Complexity of procedures
- (ii) Equity restrictions
- (iii) Disparity of laws and procedures across ASEAN

Preliminary Recommendations

Simplification of administrative processes

- For member States that require physical submission of documents for incorporation applications, to consider making the necessary forms available electronically; and to move towards enabling fully electronic submission of incorporation documents (including enabling online payment of the necessary fees).
- Work towards a fast-track process for the incorporation of a company by any member State citizen or entity registered in a member State wishing to invest in another member State.

Foreign equity restrictions

- Consider whether there are areas in which foreign equity limits may be lifted for investing parties which are registered in an ASEAN member state or who are citizens of an ASEAN member state.

Harmonisation

- Consider the feasibility of common registration requirements (including the possibility of basic incorporation forms that are common across ASEAN member States).
- Establish a searchable online registry of companies registered in ASEAN member States.
- Establish a searchable online sub-directory of MSMEs registered in ASEAN member States

Trade and Investment Barriers

Interim Findings

The research shows that:

- there has been incomplete ratification and implementation of treaty commitments;
- NTMs continue to pose concerns to businesses;
- international trade facilitation tools are not being fully leveraged;
- certain ASEAN trade facilitation actions can be prioritised and streamlined with meeting TFA requirements.
- average release times of goods are not available throughout ASEAN.
- priority sectors for services liberalisation are not aligned to with the Priority Integration sectors for goods, and are not best addressing GVC needs.
- in some instances, businesses have to deal with multiple agencies and multiple regulations, for example when obtaining approvals, or for compliance purposes. This suggests a need for greater attention to be paid to improving regulatory efficiency and regulatory interfaces with the business community, both in relation to both trade and investment.

Preliminary Recommendations

Trade Barriers

Existing agreements

- Implementation of existing agreements.
- Rollback and standstill of NTMs in Priority Integration Sectors.
- Rollback and standstill of restrictions for services in Priority Integration Sectors.

Trade Facilitation

- Align trade facilitation actions with WTO TFA.
- Accelerate trade facilitation under the TFA and where possible, ahead of TFA implementation periods.
- Establish AEO systems in all member States.

Customs Information

- Establish and publish average release times of goods.

Investment Barriers

Investment Liberalisation

- Accelerate liberalisation in a Priority Cluster of services (such as e-commerce, logistics, financial and infrastructure-related services) for ASEAN businesses to better participate in GVCs.

Investment Facilitation

- Facilitate investment in a Priority Cluster of services (such as e-commerce, logistics, financial and infrastructure-related services).
- Facilitate investments by AEOs and MSMEs.
- Develop an investment facilitation framework equivalent to the trade facilitation framework in ATIGA.
- Provide greater clarity in PPP laws, policies and implementation.

Regulatory Issues

Regulatory Connectivity

- Extend the ASEAN Guide on Good Regulatory Practice to include investment-specific regulatory good practices.
- Sharing of best practices in investment regulation.

Land Use Barriers

Interim Findings

The research shows that the land rights systems in the different ASEAN member States are at different stages of development. Whilst efforts have been made in various member States to improve their systems, more can be done to: enhance access to information relating to land; establish a uniform land titling system and improve on its governance; and clarify compulsory acquisition laws and processes. This ultimate aim is to achieve certainty, clarity and a greater degree of consistency in land rights systems across the different member States.

Preliminary Recommendations

Enhancing Access to Information relating to Land

- Introduce electronic databases for checking land ownership, encumbrances as well as boundaries and zoning matters. These databases should be made available online and accessible to anyone paying a fee.
- All procedures and fee schedules for conducting any type of property transaction should be available online for public access.
- Work towards an ASEAN portal for a consolidated database of the above information.

Establishing a Uniform Land Titling System and Improving Governance

- Accelerate a systematic electronic land titling system.
- Put in place an efficient dispute resolution mechanism to resolve long running land rights disputes.
- Set up a taskforce to study non-communal land rights and communal land rights.
- Provide education and training for government officers in charge of issuing land titles.

Clarifying Compulsory Acquisition Laws and Processes

- Clarify the meaning of key terms, and measures of compensation.
- Establish grievance procedures and dispute resolution mechanisms.
- Set up an ASEAN working group to study best practices on compulsory acquisition laws and processes.

Dispute Settlement Barriers

Interim findings

The research indicates that there is a general need to increase legal knowledge in certain areas of cross-border and international law (such as enforcement of arbitration awards under the New York Convention).

Preliminary Recommendations

Judicial Connectivity

- Increase judicial dialogue at all levels of courts within ASEAN on international law and cross-border enforcement matters.
- Wherever possible, publish commercial law judgments of ASEAN member States' highest appellate courts in English, with online access.

Legal Information Barriers

Interim findings

While there are good online portals and databases being developed in ASEAN on trade and investment laws, there is a general need to improve the availability of information on the following.

Preliminary Recommendations

ASEAN Trade and Investment Laws Information

- Establish an up-to-date searchable database to cover the following.
- Status of ASEAN agreements and treaties.
- NTMs, and NTB reports and status of each case (building on the ATR and Matrix of Actual Cases).
- TFA measures of member States, especially for AEOs and MSMEs.
- Investment Laws of member States.
- Infrastructure and PPP laws and policies.

LIST OF CHARTS AND TABLES

Charts	
1	Profile of Businesses which Completed Survey
2	Proportion of Respondents in ASEAN's 12 Priority Integration Sectors
3	Company Function/Designation of Respondents
4	Countries in which Respondents had Investments
5	Sectors which Respondents Represented
6	Survey Responses to Obstacles in Doing Business in ASEAN
7	ASEAN: Time to Start a Business (days)
8	Survey Responses on Continuing Obligations
9	ASEAN: Documentary Compliance – Time (Hours) and Costs (USD) to Import
10	ASEAN: Documentary Compliance – Time (Hours) and Costs (USD) to Export
11	Quality of the Land Administration Index (0-30)
12	Time to Enforce Contracts (Days)
13	Costs of Enforcement (% of Claim)

Tables	
1	Survey Responses on Obstacles to Business Set-up
2	World Bank's Ranking for Starting a Business for ASEAN States
3	Availability of Electronic Options in Incorporation
4	Foreign Equity Policies
5	NTMS notified by ASEAN member States at the WTO
6	State of Play of ASEAN Single Window Legal Implementation
7	Examples of Foreign Investment Restrictions in Logistics
8	Examples of Foreign Investment Restrictions in E-commerce
9	Efficiency of Legal System in Property Registration in ASEAN
10	Digitisation of Title Records and Electronic Databases in ASEAN
11	Information relating to Land Ownership, List of Documents and Fees
12	Barriers Encountered relating to the Acquisition of Land Rights

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