

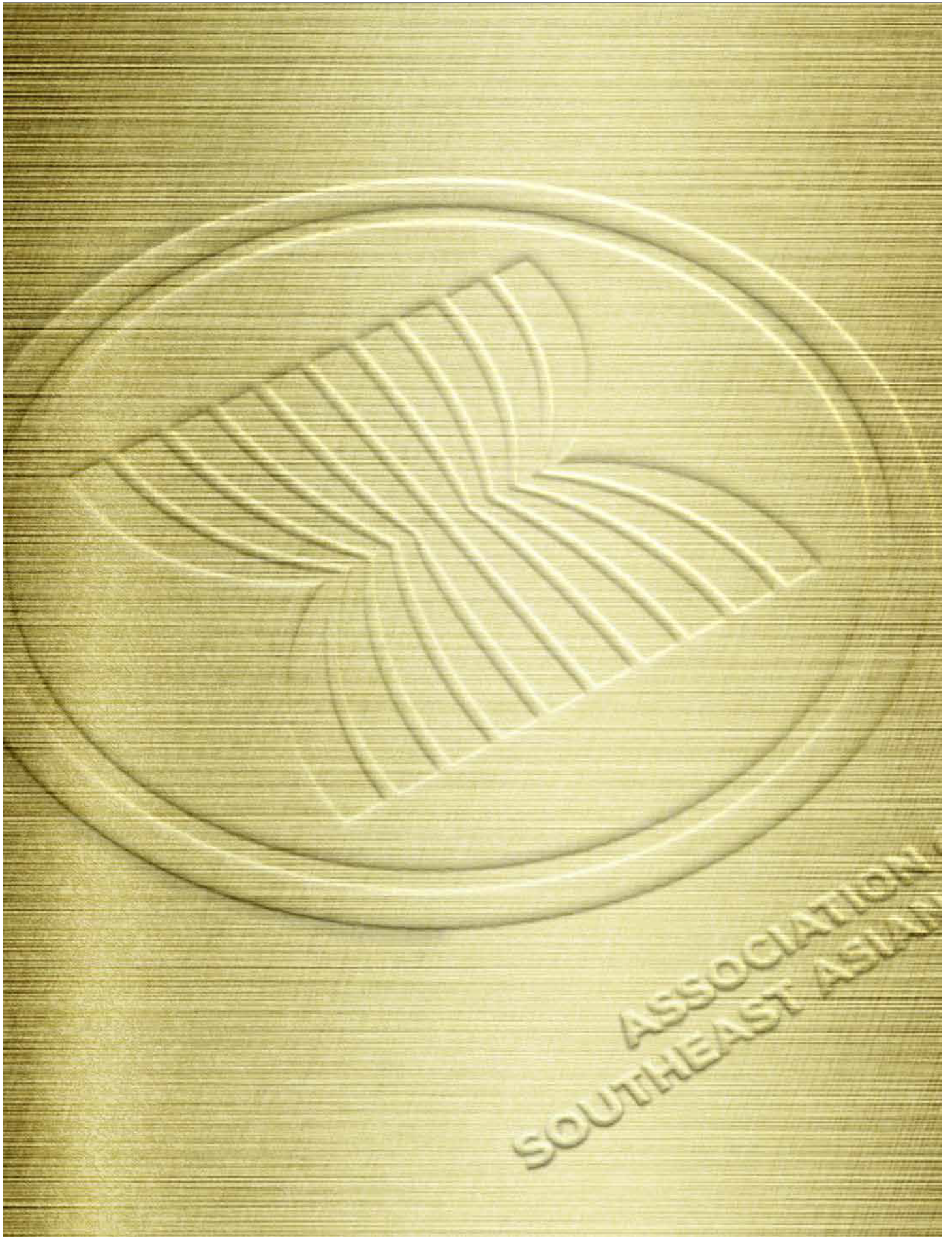


Beyond Free Trade Agreements: Forging ASEAN Common Market Creates Unique Challenges for In-house Counsel

Corporate, Securities, and Governance



ASSOCIATION
SOUTHEAST ASIANS



CHEAT SHEET

- **The ASEAN way.** The Association of South East Asian Nations is attempting to build a single market without binding dispute-settlement mechanisms or a single regulatory apparatus.
- **A laissez-faire approach.** ASEAN prides non-interference in the internal affairs of members and favors consensus-based decision making.
- **A blueprint for success.** The ASEAN Economic Community blueprint is well on its way to adoption, and focuses on harmonizing capital markets and payment and settlement systems.
- **Something to consider.** Take note of the opportunities and threats created by trade liberalization and how it might affect your business

New free trade agreements (FTAs) make life interesting for in-house counsel who conduct business in those countries. Interpreting hundreds or thousands of pages of provisions, including annexes and other ancillary documents, and distilling the essentials to provide practical guidance for various departments within the company — finance and tax, production, sales and marketing, logistics, human resources, etc. — may allow the in-house legal department to shine, but it's exacting work.

It is challenging to sort out new foreign direct investment limits; changes to the treatment of foreign establishments and market access rules in the countries involved; new customs procedures and rules of origin; new rules for trade in services and visits for company personnel; treatment of intellectual property; changes to government procurement programs, e-commerce, agreed environmental standards, dispute-settlement mechanisms; and much more. Even with assistance from outside counsel, it's up to the in-house legal practitioners to determine, among other things:

- What's relevant and what's not;
- Where the new FTA offers opportunities and advantages for the organization and where it presents new business challenges; and
- What changes need to be made as it pertains to how things are done.

Some multilateral agreements go further than even the most complex FTAs by creating a single regional market that is cemented by a unifying vision that goes beyond economics. It uses economic integration as both a starting point and as a lever to advance closer political and sociocultural integration.

The European Union (EU) is, of course, the most ambitious and well-established example. The Association of Southeast Asian Nations (ASEAN) is another. Their original *raison d'être* and broader goals are similar.

The EU's forerunner, the European Economic Community, was formed in 1957 by the Treaty of Rome, which was signed by Germany, France, Italy, the Netherlands, Belgium, and Luxembourg, and grew out of a collective post-war desire to avoid similar European conflicts in the future, to optimize regional security, largely against the Soviet Union, and to strengthen the individual economies of the member states. All were democracies, with predominantly Christian and increasingly middle-class populations, sharing many social and political values and a heightened respect for the rule of law.

Similarly, the main imperative behind the formation of ASEAN — originally formed on August 8, 1967, by Indonesia, Malaysia, the Philippines, Singapore, and Thailand, with the signing of the ASEAN or “Bangkok” Declaration — was to promote regional political and economic cooperation and stability in the face of ongoing wars in the region, primarily French Indochina. The ASEAN Free Trade Area (AFTA), which was established on January 28, 1992, by the original five members plus Brunei, included other economic development measures, such as a common preferential tariff that promotes the free flow of goods between member countries.

The ASEAN Community, as it is known today, came into being with the signing of the ASEAN Charter in November 2007 by all founding member states as well as Cambodia, Laos, Myanmar, and Vietnam. The charter turned ASEAN into a legal entity with a key goal of completing the foundations for a single common market (the ASEAN Economic Community or AEC) within the region by December 31, 2015.

But there, the similarities between the EU and ASEAN largely end.

Leveraging trade agreements: Top tips for in-house counsel

1. Get involved with formulating any input/response to government that your industry association is preparing to submit as early in the trade agreement negotiation process as possible. Not only will you help to ensure your company’s views are represented, you may learn about issues or opportunities you have not yet uncovered.
2. For the same reasons, explore whether there are opportunities to get directly involved in formal consultations, such as via business advisory councils.
3. Analyze the primary text of the agreement to ensure you understand the broad potential ramifications for your business and industry, and those of key suppliers, customers, and competitors. By all means, read the analyses provided by law firms, accounting firms, and others but in-house counsel are best at determining what provisions are most relevant for your business.
4. Review specific commitment schedules to see what member countries are committing to and their timeframes. Will these accelerate potential market entry or delay them?
5. In light of the above, consider the opportunities and threats created by trade liberalization — from removal of tariffs and quotas and elimination/reductions of local content requirements to the opening of service delivery modes.
6. Consider specific themes, like the introduction of competition laws in countries where they were lacking, or the introduction of more robust IP or consumer protection laws — might these make your business reconsider countries/markets that had previously been unappealing?
7. Expect that you will need to know more about relevant law in the other countries party to the agreement. You can’t be an expert (that’s what law firms in those other countries are for), but knowing key differences in areas that will significantly influence your company’s decisions to expand operations in those countries will be essential to effectively guide the executive team.
8. After the agreement is in place, keep up with statistics on trade flows, and the economic and political situation of the countries involved in the agreement, and work with your industry association to provide input to your government on possible scenarios for the expansion of the agreement, in terms of areas covered by it and potential new parties to it.

Going the “ASEAN Way”

ASEAN member countries are a diverse group when it comes to national wealth, stage of development, size, political, and religious orientations. As McKinsey & Company pointed out in a recent report:

“Indonesia represents almost 40 percent of the region’s economic output and is a member of the G20, while Myanmar, emerging from decades of isolation, is still a frontier market working to build its institutions. GDP per capita in Singapore, for instance, is more than 30 times higher than in Laos and more than 50 times higher than in Cambodia and Myanmar; in fact, it even surpasses that of mature economies such as Canada and the United States. The standard deviation in average incomes among ASEAN countries is more than seven times that of EU member states. That diversity extends to culture, language, and religion. Indonesia, for example, is almost 90 percent Muslim, while the Philippines is more than 80 percent Roman Catholic, and Thailand is more than 95 percent Buddhist.”

Understanding ASEAN: Seven Things You Need to Know. By Vinayak HV, Fraser Thompson, and Oliver Tonby, McKinsey & Company; May 2014; www.mckinsey.com.

This reality, plus the fact that ASEAN has taken a significantly different approach than the European Union for creating a rulebook for its common market, is what is making things so interesting for companies that operate in the region, and particularly for their in-house counsel.

ASEAN is attempting to build its single market without either a strong central executive apparatus (such as the European Commission in the European Union) or a carefully developed body of laws that member states are required to adopt into national law, or binding dispute-settlement mechanisms. This approach stems from ASEAN’s long-held principles of non-interference in the internal affairs of its members and its preference for decision-making by consensus — what is referred to as the “ASEAN Way” and which has been described as a methodology for resolving issues that respects the cultural norms of Southeast Asia.

“A working process or style that is informal and personal. Policymakers constantly utilize compromise, consensus, and consultation in the informal decision-making process... it above all prioritizes a consensus-based, non-conflictual way of addressing problems. Quiet diplomacy allows ASEAN leaders to communicate without bringing the discussions into the public view. Members avoid embarrassment that may lead to further conflict.” Masilamani, Logan; Peterson, Jimmy. “The ‘ASEAN Way’: The Structural Underpinnings of Constructive Engagement.” *Foreign Policy Journal*; 15 October 2014).

Instead, since 2007, it has followed an “AEC Blueprint,” which has four major planks to achieve what the blueprint defines as the free movement of goods, services, investment, skilled labour, and freer flow of capital:

- A single market and production base;
- A highly competitive economic region;
- A region of fair economic development; and
- A region fully integrated into the global economy.

The ASEAN Charter did call for the formation of an Economic Community Council at the ministerial level to handle substantive matters in the development of the AEC. The council is supported by the

Senior Economic Officials Meeting, a group of senior bureaucrats from each country that meets between council meetings. The charter also required that each member appoint a permanent representative to the ASEAN Secretariat in Jakarta, Indonesia. This Committee of Permanent Representatives (CPR) does much of the legwork, liaising with the secretariat, councils, and national secretariats established within the member states' national governments. Final decisions are made and agreements signed by the ASEAN Summit, which comprises the heads of government of all 10 member states.

ASEAN at a glance

WHAT IS IT?

The Association of Southeast Asian Nations (ASEAN) is a political and economic organization of 10 Southeast Asian countries. It was originally formed on 8 August 1967 by Indonesia, Malaysia, the Philippines, Singapore, and Thailand (often referred to as the "ASEAN-5"). Brunei Darussalam became its sixth member in 1984, very shortly after gaining independence from the United Kingdom.

ASEAN became a legal entity with the signing of the ASEAN Charter in November 2007, when Cambodia, Laos, Myanmar, and Vietnam also joined. The primary aim was to create a common market (the ASEAN Economic Community or AEC) within the region by December 31, 2015. Overall, the ASEAN project encompasses two other "pillars": 1) sociocultural, which focuses on human development, social welfare, social justice and rights, ensuring environmental sustainability, building the "ASEAN identity", and narrowing the development gap between its members; and 2) political-security, which involves protecting regional stability and providing a mechanism for member countries to resolve differences peacefully.

Some progress, some pain

So, six months beyond ASEAN's December 31, 2015, self-imposed deadline for implementing key aspects of the AEC, how are things going? From the perspective of in-house counsel in two of the region's largest financial services organizations, a significant amount of progress has been achieved in this sphere, particularly in areas such as harmonizing capital account regimes, capital markets, and payment and settlement systems. Restrictions on banks, insurance companies, and investment companies that provide financial services in other ASEAN member states are being eased gradually, with member representatives meeting regularly to negotiate which financial services each country is willing to liberalize, and to what extent, during a specified timeframe. (Liberalization also takes into account the readiness of the member economies and their financial and regulatory systems, e.g., "developing" countries like Indonesia, Thailand, and Singapore, versus "least developed" economies such as Cambodia, Laos, and Myanmar.)

However, a significant amount of work also remains to be done to achieve the goal stated in the AEC Blueprint of achieving a well-integrated and smoothly operating regional financial system and a "semi-integrated financial market" in place by 2020, which is the medium-term goal adopted in 2011 by all central bank governors in their ASEAN Financial Integration Framework (AFIF). In addition to more progress in liberalization, the focus should be strengthening regulatory and supervisory cooperation, reducing systemic risks, and ensuring a level playing field regionally to build capacity in many

countries — particularly in human capital — and to offer an adequate level of consumer protection throughout ASEAN. These are the kinds of issues that concern in-house counsel in financial institutions in the region on a day-to-day basis.

The liberalization of banking services is already quite far along, as part of the ASEAN Framework Agreements on Services (AFAS). But the actual level of integration in ASEAN's banking sector at this point is relatively limited. There is great opportunity for growth. [As some analysts have noted](#), greater intra-ASEAN trade and investment will also help encourage more banks to expand their operations regionally to better serve their clients.

AFAS is prompting Thailand-based banks, among others, to expand, not only by building a banking presence in other member countries but also by expanding into insurance, securities, and leasing services. For instance, Siam Commercial Bank (SCB), Thailand's oldest and second-largest commercial bank by assets, announced in July 2015 that it would set up a wholly owned branch in Vietnam by taking over Vinasiam Bank, which is a joint venture among SCB, the Vietnam Bank for Agriculture and Rural Development, and the Thai conglomerate Charoen Pokphand Group.

But liberalization is also challenging in-house counsel. For instance, if we're expected to advise on what financial services and products could be launched in a specific ASEAN country, a basic understanding of the relevant laws in each member state will become compulsory, even if we will, naturally, work with local lawyers in those other countries on the specifics. Providing support to meet the criteria to become a "Qualified ASEAN Bank" in another member country will also be a learning curve for corporate counsel. (See sidebar below)

The Southeast Asian two-step: "Qualified ASEAN Banks"

On March 21, 2015, ASEAN finance ministry representatives signed a new framework agreement in Kuala Lumpur, Malaysia, that further advances the integration of the region's banking sector. The ASEAN Banking Integration Framework (ABIF) is founded on "inclusiveness, transparency, and reciprocity," according to the joint statement issued by member countries' finance ministers at the time.

Again, the ASEAN model differs from the EU in that it will not have an equivalent of the European Central Bank. Instead, under the ABIF, the national central banks (or other designated authorities) in each country will have more flexibility in agreeing on bilateral arrangements with each other — another acknowledgement by member states that a "one size fits all" approach such as Europe's will not work for the ASEAN, at least during the early stages of integration.

Pursuant to the ABIF, banks based in all ASEAN countries will have the opportunity to achieve Qualified ASEAN Bank (QAB) status, the criteria for which will be determined by the two central banks of the countries (or other designated authorities) involved in the bilateral agreement. On achieving the agreed-upon QAB criteria, the bank will be allowed to operate in both countries, which financial authorities believe should also help to boost trade and investment between the two nations involved.

Given the high capital requirements and other barriers to entry in some ASEAN countries versus others, the introduction of QAB and its reciprocity principle should enable more banks in the region to expand beyond their national borders, prompt some needed consolidation in some countries via greater competition, spur innovation, and improve services for both business and retail customers.

Conclusion? If so, can we make this a little stronger with a tie back to in-house counsel and practice?

In fact, with each ASEAN country having its own legal system and tax regimes, there will be a need for larger companies of all kinds to have some understanding of the comparative advantages or disadvantages of those systems for their industries in other ASEAN countries, as well as the ability to hire knowledgeable external experts. Then, there are related external international developments that are impacting the decisions of major corporations everywhere on where to locate head offices, subsidiaries, and other operations, particularly the OECD/G20 Base Erosion and Profit-Shifting (BEPS) Action Plan. While no ASEAN country could be said to be at the centre of these discussions, compared to say, our Pacific neighbours Australia and Japan, we expect all are watching the discussions closely to determine possible impacts on their national economic growth aspirations as well as that of ASEAN.

ASEAN also presents great opportunities for insurance companies as disposable incomes rise and financial literacy improves. Current market penetration rates are low and, for the life and health sector, the lack of public social welfare systems such as Europe's means demand for private insurance, for both groups and individuals, will continue to increase. As important, regional integration offers potential mechanisms for bringing better regulatory oversight to the industry, a broader pool of skilled labour, and a playing field that becomes more level — and more transparent and accountable — for both ASEAN and foreign-based insurers.

However, action related to the insurance market in these areas has been slow, partly because insurance was not a sector specifically addressed in the 2007 AEC Blueprint. In fact, the first ASEAN Insurance Summit wasn't held until October 2014 and it's been the only one to date. As a result, numerous outstanding issues are creating challenges for market players and their in-house counsel.

For example, regional rules on foreign ownership and permitted establishments/operations currently vary significantly. While Singapore and Vietnam are relatively open, and the Philippines and Indonesia have committed to liberalizing some aspects of life insurance markets, other ASEAN nations still appear reluctant to open their markets to foreign insurers.

Why ASEAN?

That's a question many in-house counsel colleagues in other parts of the world might ask. Why did the leaders of ASEAN decide a regional common market was necessary, considering the veritable alphabet of regional and international trade pacts many of the member countries already belonged to?

First, take for one example, the "grand-daddy" of them all, the World Trade Organization or WTO. Set up as an intergovernmental organization to regulate international trade, pursuant to the Marrakesh Agreement signed by 123 nations on April 15, 1994, the WTO pact replaced the General Agreement on Tariffs and Trade (GATT), which had its own start in 1948. The WTO deals with regulation of trade between participating countries by providing a framework for negotiating trade agreements. The GATT is still the umbrella treaty for trade in goods. The WTO also administers and enforces other major agreements, including the General Agreement on Trade in Services (GATS), the Trade-Related Investment Measures Agreement (TRIMS), and the Agreement on Trade-Related

Aspects of Intellectual Property Rights (TRIPS). It also provides a dispute resolution process to enforce all WTO agreements that have been signed and ratified by member countries. All ASEAN member countries are also members of the WTO under which they are classified as “developing” or “least developed” countries.

After several rounds of generally successful negotiations over the years, WTO negotiations on the “Doha Round” – launched in 2001 with a special focus on developing countries – became mired in discord, and have not been completed to date. Many observers credit the growing number of bilateral and multilateral agreements signed since that time to frustration at this failure.

APEC, or the Asia-Pacific Economic Cooperation trade forum, is another. Established in 1989, APEC was a response to the increasing interdependence of many Asia-Pacific economies and the formation of regional trade blocs in other parts of the world, such as the EU. A key goal was to secure new markets for agricultural products and raw materials. Today, APEC’s 21 Pacific Rim member “economies” include Australia, Korea, the Peoples Republic of China, Canada, and the United States, as well as several ASEAN members: Brunei, Indonesia, Malaysia, Philippines, Singapore, Thailand, and Vietnam.

And now, there is the Trans-Pacific Partnership (TPP). Signed with great fanfare on February 4, 2016, in Auckland, New Zealand, after seven years of negotiations, the TPP is a comprehensive trade agreement among 12 Pacific Rim countries, including Australia, Canada, Chile, Japan, Mexico, New Zealand, Peru, and the United States, as well as four of the 10 ASEAN member countries: Brunei, Malaysia, Singapore, and Vietnam. Other ASEAN members – Indonesia, Laos, the Philippines, and Thailand – have expressed interest in becoming parties to the TPP.

With its stated goals to “promote economic growth; support the creation and retention of jobs; enhance innovation, productivity and competitiveness; raise living standards; reduce poverty; and promote transparency, good governance, and enhanced labor and environmental protections,” the TPP is both far-reaching and somewhat controversial. Among other things, the 30-chapter agreement includes measures to lower trade barriers such as tariffs, and establishes an investor-state dispute settlement mechanism. It will enter into force after all party countries have ratified it, but if this doesn’t happen before February 4, 2018, it will come into effect as soon as it is ratified by a minimum of six countries that together comprise more than 85 percent of the total GDP of all signatory nations.

But, as important as trade agreements are, they fall short of the level of integration — economically, socio-culturally, and political-security-wise, that the founders of ASEAN envisioned achieving.

As an October 2015 report by the consulting firm Global Counsel points out, the extent to which non-ASEAN insurers will benefit from the AEC-led liberalization of ASEAN insurance markets still remains unclear.

“Under the AEC framework, only ‘ASEAN insurers’ will be permitted to take advantage of enhanced market access rules resulting from liberalization process. However, ASEAN countries have yet to agree on a definition for what constitutes an ‘ASEAN insurer’.”

Varying levels of competent regulatory capacity is another issue. The prospect of regional market liberalization has prompted new capitalization rules in most ASEAN states, and regulatory standards

are rising: All ASEAN nations now have technically independent insurance regulators except for three of the “least developed” members: Cambodia, Laos, and Myanmar. However, as the Global Counsel report noted, “foreign insurers can still face restrictive and sometimes opaque regulatory practice from some regulators. This can include restrictions on moving staff into markets or data out of them and limitations on the range of assets foreign insurers can hold. Unpredictability and limited consultation on regulatory change also remains an issue with some regulators.”

Regarding human resource issues, there is a significant need to expand the professional talent pool across the region. For example, the Indonesian Financial Service Authority has identified a need for at least 1,000 more actuaries to meet new business needs, including rising regulatory requirements in Indonesia alone. So, expanding educational opportunities to qualify new actuaries, and standardizing professional qualifications across the region, are things the insurance industry is looking for.

Last year, the ASEAN Insurance Counsel formed an Actuarial Talent Development Working Committee, but little else has been accomplished on that side to date. Under the ASEAN Framework Agreement on Services (AFAS), several “Mutual Recognition Arrangements” have been provided to guide bilateral or multilateral harmonization of standards and other means to facilitate cross-border mobility of professionals and skilled labor in areas such as engineering and accounting. But some ASEAN states are more concerned with the need to develop their own domestic skills base in sophisticated areas like insurance. Thus, facilitating freer trade in services and labor mobility have not been key priorities to date.

However, despite slow progress in some areas, one can see the ASEAN project taking shape. Have some major steps forward been accomplished, particularly in the economic integration realm? Yes. Are we a “community” yet? No.

While government officials, business leaders, and in-house counsel are watching developments closely, studies have indicated that there is a low awareness among the general population, particularly outside the major cities, where literacy rates and media access are lower, of what ASEAN is and what it means for citizens. In addition, there has been some skepticism about how much the ASEAN initiative will help to alleviate poverty and improve economic opportunities, human rights, and freedoms for all across the region.

There is significant potential, particularly in improving the rule of law as it is applied to governments, businesses, and individuals: the realization of the importance of fair and equal treatment, transparency, and accountability in building a common regional identity appears to be rising among all governments, and may indeed lead eventually to a “floating of all boats” in the region. In signing, on November 22, 2015, the Kuala Lumpur Declaration, laying out the “ASEAN Community Vision,” all national leaders agreed to, among other things:

“... consolidate our Community, building upon and deepening the integration process to realise a rules-based, people-oriented, people-centred ASEAN Community, where our peoples enjoy human rights and fundamental freedoms, higher quality of life, and the benefits of community building, reinforcing our sense of togetherness and common identity”

How much can be achieved in this direction in another decade among 10 such very different countries? Check in with us in 10 years and we'll let you know.

This article reflects the personal views and opinions of the authors, and not their employers/firms.

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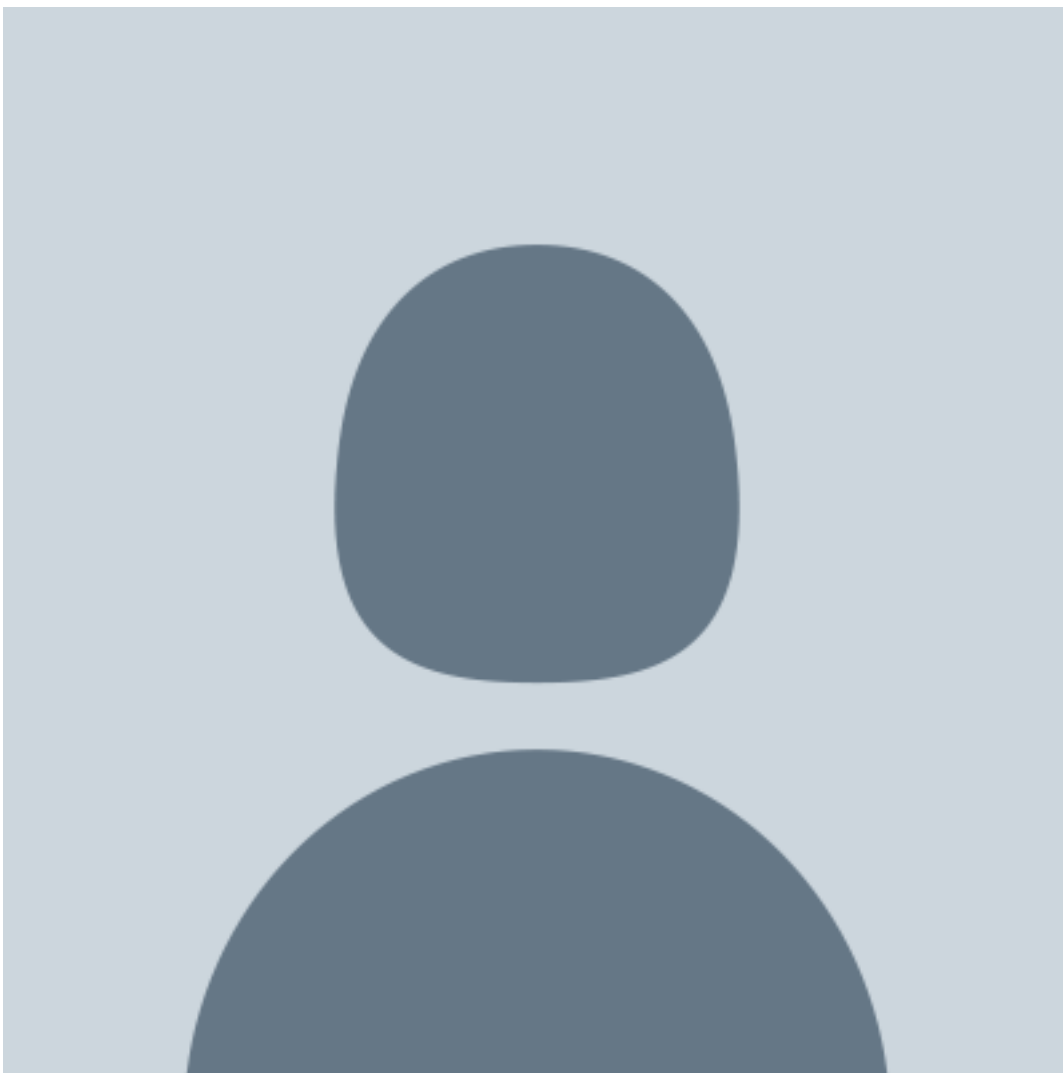
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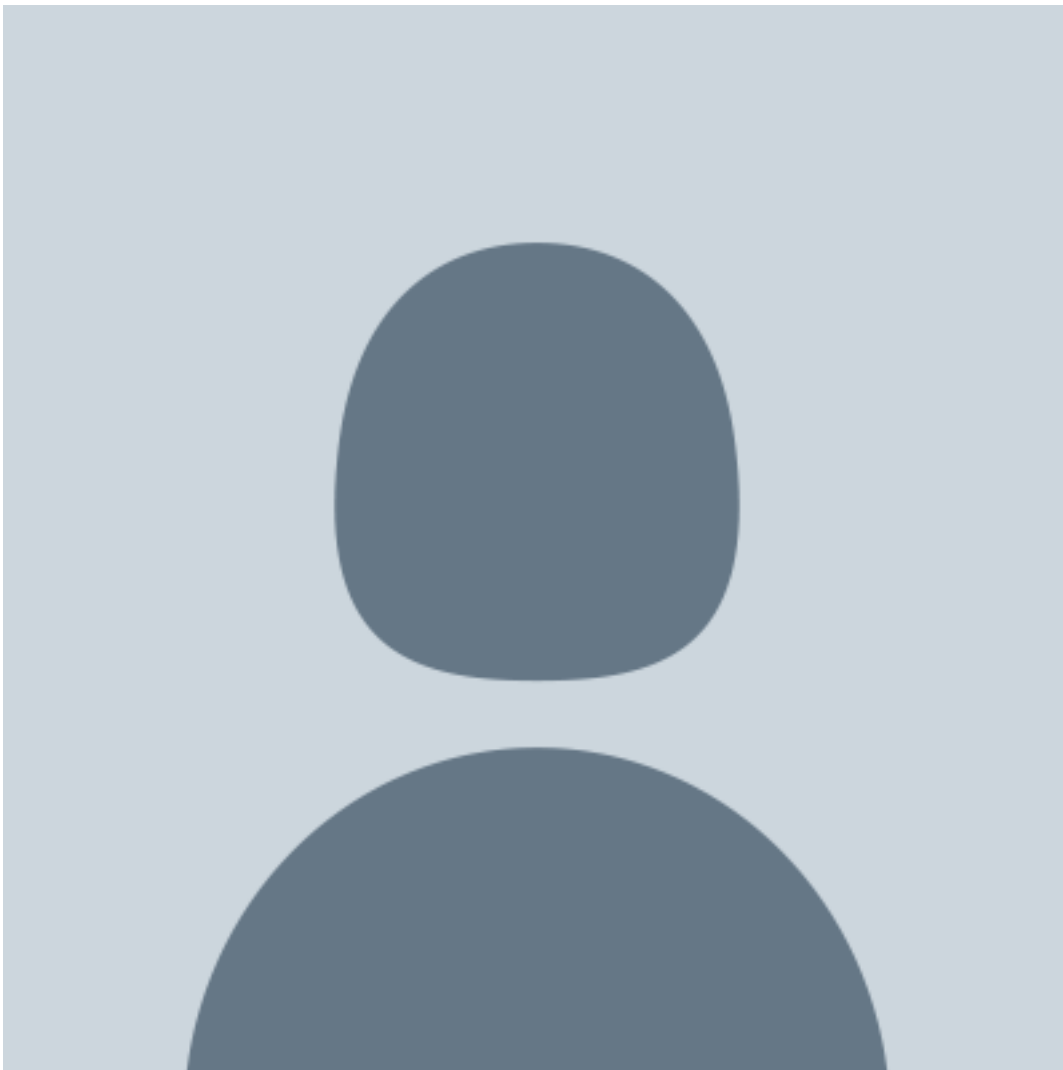


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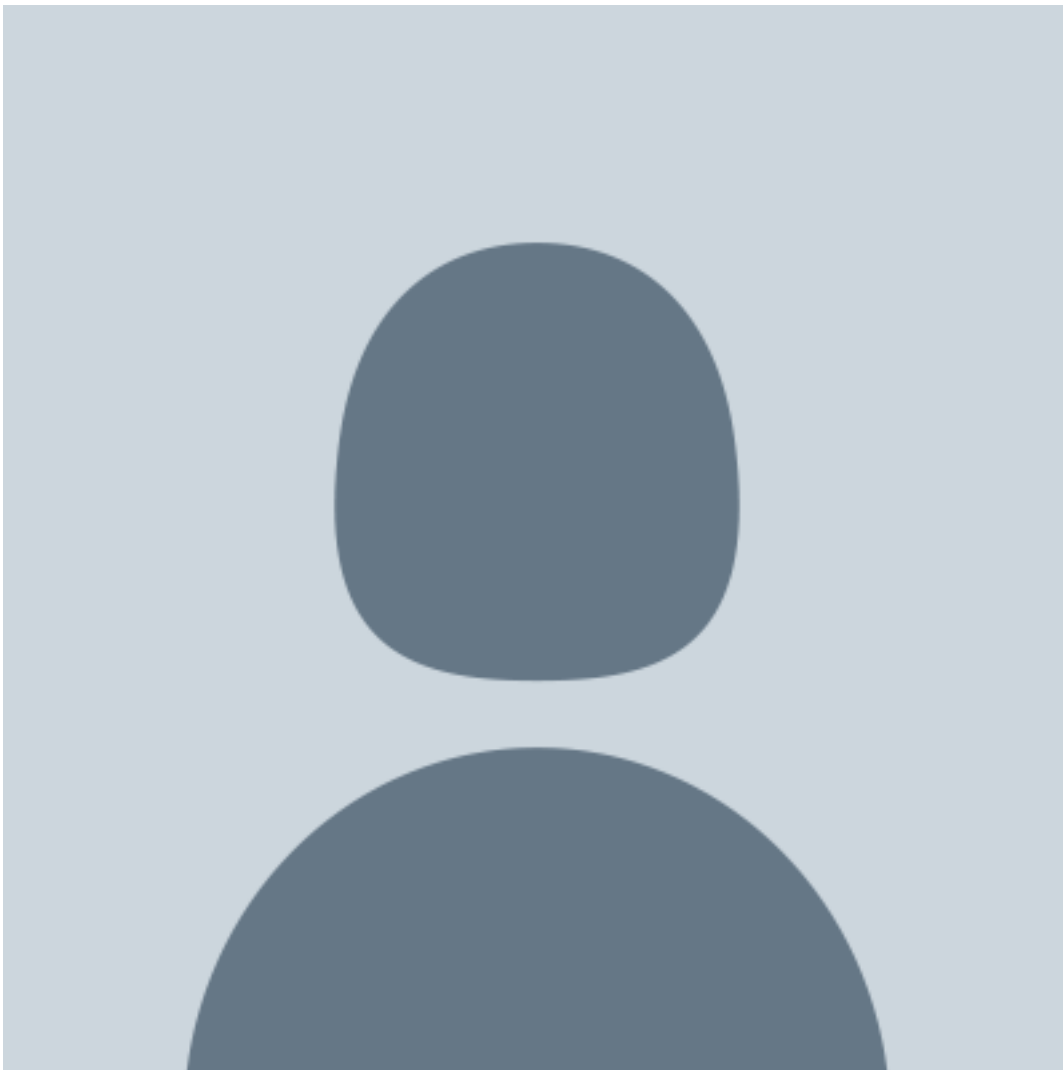
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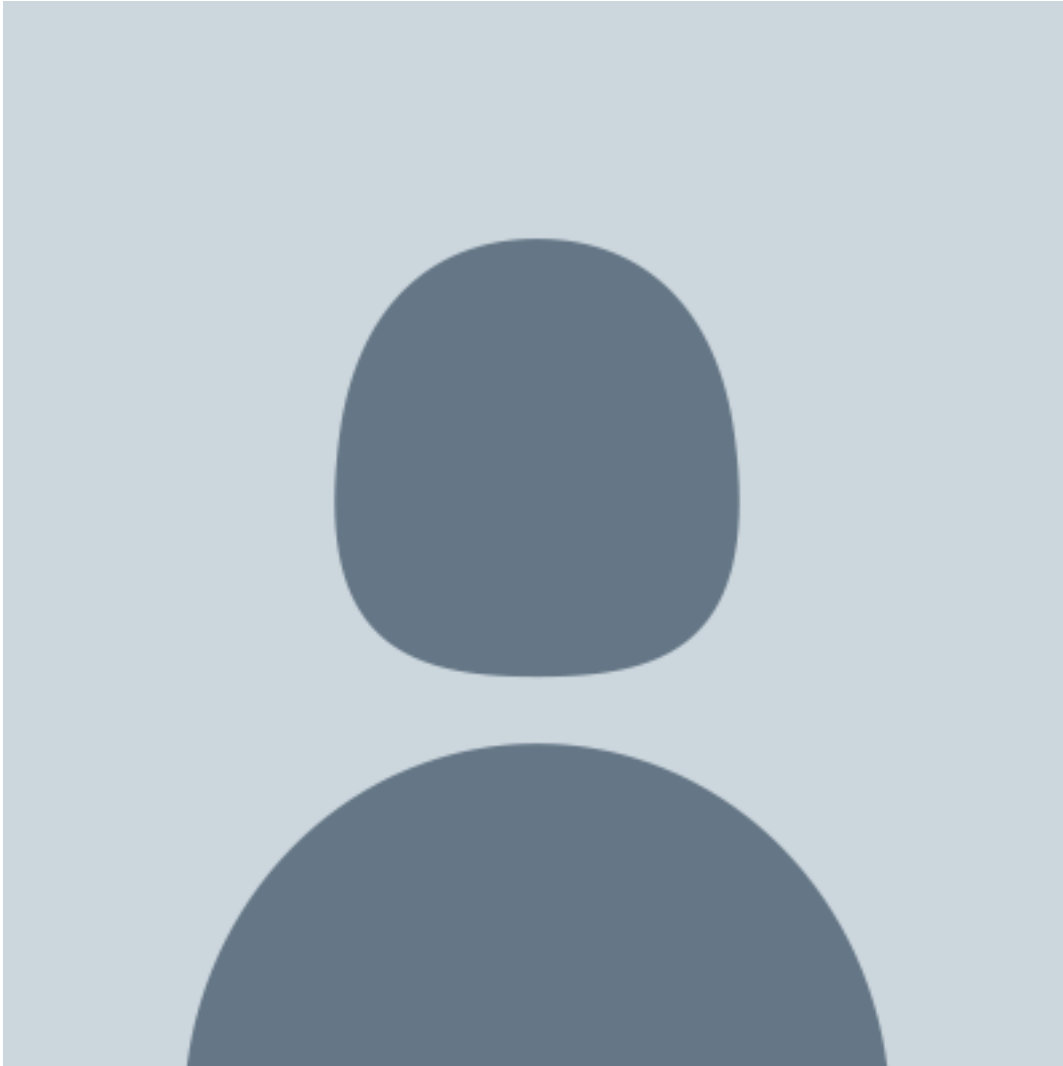
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