

# Challenges for Timor-Leste in Acceding to the ASEAN Economic Community

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## Background: the Situation in Timor-Leste

- The starting point: only 13 years of independent government after
- 400 years of colonisation by Portugal and 40 years of occupation by Indonesia.
- On a variety of standard of living indicators, Timor-Leste is poor.
- Some complications:
- Oil resources or resources curse: potential for improvement in infrastructure. But risk of developing unsustainable fiscal position & other risks;
- Foreign donor economy: useful contributions but can skew price signals and behaviour.
- Post-conflict situation adds complicating factors: political weight of freedom fighters,
- Land Tenure is unsettled,
- Language
- Overall Situation can place pressure on developing democratic and constitutional institutions: eg. Law regulating journalists, expulsion of foreign judges

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## Challenges for an Acceding Member

- 1<sup>st</sup> Challenge: Developing capacity to accede and participate
- 2<sup>nd</sup> Challenge: What procedure for accession?
- 3<sup>rd</sup> Challenge: What treaties?
- 4<sup>th</sup> Challenge: What Content in Schedules?
- 5<sup>th</sup> Challenge: What Changes to Laws? Are transitions allowed?

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## Challenge #1 - Capacity

- Official Language of ASEAN is English
- Capacity for satisfying Transparency requirements– Timor-Leste is already publishing a Jornal containing all new laws and regulations
- Capacity for satisfying obligations regarding administration of laws –
  - Timor-Leste has created SERVA (a one stop agency for registering business entities, and obtaining some business licenses;
  - starting to enhance role of Department of Customs as a one stop agency for all approvals for import and export of goods to satisfy the obligation to have a National Single Window; one of the challenges will be to attain cooperation between agencies; and to coordinate computer and online capacity.
  - Created a new agency, Trade Invest Timor for dealing with foreign investment approvals
- Capacity for satisfying requirements for impartial and objective review of decisions – limited capacity of the judicial system

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## Capacity continued

- Capacity and expertise within Ministry of Foreign Affairs and Cooperation –
  - training formal qualifications and on the job learning;
  - adopting an organizational structure suitable for covering the areas of expertise
- Capacity for coordination across the whole of government – so that treaty obligations are taken into account in all decisions about changing laws and practices.

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### **Challenge No 2: What procedure does an Accession follow?**

- There is no published accession procedure.
- Timor-Leste would be the first country to accede to the ASEAN Charter.
- All previous accessions to ASEAN were before the ASEAN Charter (Nov 2007): the last was Cambodia on 30 April 1999
- Can observe earlier Protocols and schedules from pre-Charter accessions
- But no public records to indicate whether existing ASEAN Members scrutinized the acceding members existing laws and required them to be changed.
- No published records of any Working Party; no published Working Party Report on Accession

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## Challenge #3 – What treaties?

- The **ASEAN Charter, 20 Nov 2007** in force 15 December 2008:
- Art 6.3 admission by consensus of the ASEAN Summit, upon recommendation of the ASEAN Coordinating Council
- Art 2.1 members must “adhere to the fundamental principles contained in the declarations, agreements, conventions, concords, treaties and other instruments of ASEAN”
- Art 2(2) member must act in accordance with 14 principles including
- (n) “adherence to multilateral trade rules and ASEAN’s rules based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy.”
- BUT there is no Annex with a list of treaties.

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## The Blueprint for the ASEAN Economic Community of 20 Nov 2007

- A statement of what the existing 10 ASEAN Members are supposed to do in order to bring the ASEAN Economic Community into existence by 31 December 2015.
- It is not a treaty and does not create binding legal obligations under international law between the States.

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### Does “adherence to Multilateral trade rules” under Art 2.2 mean being a Member of the WTO?

- On 20 Nov 2007, 9 of 10 signatories to the ASEAN Charter were Members of WTO but one, Laos was not - --> indicates 2.2 does not require WTO Membership.
- Laos became a member of WTO in 2013.
- Might be interpreted as requiring conformity with all or most WTO rules
- The ASEAN (10) may not reach a consensus to admit Timor-Leste until after Timor-Leste becomes a WTO Member.
- In any case, some provisions of ASEAN treaties require compliance with provisions of WTO treaties.

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### How does one identify the ASEAN treaties to which Timor-Leste must accede?

- ASEAN webpage for ASEAN Economic Community
- Table of ASEAN Treaties / Agreements and Ratification as of March 2012
- ASEAN webpage for ASEAN Legal Instruments at <http://www.asean.org/resources> to <http://agreement.asean.org/>
- On 30 April 1999, the *Protocol of Accession of Cambodia to ASEAN* lists 26 treaties.
- On 29 November 2004, *ASEAN Protocol on Enhanced Dispute Settlement Mechanism*, Annex of Covered Agreements lists 46 treaties.
- For period from 29 Nov 2004 to the date of the ASEAN Charter on 20 November 2007, the ASEAN Legal Instruments of AEC list refers to 8 treaties #32 to #39 plus any amending Protocols of other instruments.
- For period from date of the ASEAN Charter, 20 November 2007 to 5 May 2015, the ASEAN Legal Instruments of AEC refers 16 more treaties: #15 to #31 plus any amending Protocols or other instruments.

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## So Timor-Leste would need to accede to:

- All of the treaties between 1967 and 30 April 1999 listed in *Protocol of Accession of Cambodia*.
- All of the treaties between 30 April 1999 and 29 Nov 2004 that are listed in the *Protocol on Enhanced Dispute Settlement Mechanism* of 29 Nov 2004.
- All treaties dealing with economic subject matter dated between 29 November 2004 and the date of accession of Timor-Leste.
- But not superseded treaties.
- Might include treaties not in force because some of the existing 10 members have not ratified them yet.

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## On trade in goods

- *ASEAN Trade in Goods Agreement* 26 Feb 2009 (in force 30 April 2010) (supersedes 1992 Agreement for CEPT for the ASEAN Free Trade Area)
- Which incorporates:
- *Protocol to Provide Special Consideration for Rice and Sugar*, 23 August 2007 (in force 23 August 2007) as amended by *Protocol to Amend the Protocol to Provide Special Consideration for Rice and Sugar*, 28 Oct 2010 – which provides for a safeguard provision (in addition to other safeguard provisions under ATIGA ) for rice and sugar.
- And Protocols implementing Schedules of Duty Rates on Goods
- [plus some instruments on harmonizing product standards]

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## On customs matters:

- *ASEAN Agreement on Customs*, 30 march 2012 (in force 7 Nov 2014)
- *Protocol Governing the Implementation of the ASEAN Harmonized Tariff Nomenclature* 7 August 2003 and two amending Protocols.
- *Agreement to Establish and Implement the ASEAN Single Window*, 9 December 2005
  - Which contains an obligation to establish a National Single Window

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## On Trade in Services

- *ASEAN Framework Agreement on Services*, 15 December 1995 (and amending Protocol 2 Sept 2003) (“The FAS”)
- *Eight Protocols to Implement Packages of Commitments under the FAS* - most recent 8<sup>th</sup> Protocol dated 28 October 2010, in force 28 January 2011
- *Five Protocols to Implement Packages of Commitments on Financial Services* under the FAS – most recent 5<sup>th</sup> package dated 4 May 2011, in force 4 August 2011.
- Timor-Leste will need to submit a Package of Commitments (Schedule of existing measures in derogation of MFN, Schedule of Specific Commitments, Horizontal Section of Schedule, possibly a separate Schedule of Commitments in the Financial Services Sector)

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## In the field of air transport

- *ASEAN Multilateral Agreement on Air Services*, 20 May 2009 , in force 13 October 2009 accompanied by Protocols 1 to 6.
- *ASEAN Multilateral Agreement on the Full Liberalisation of Passenger Air Services*, 12 Nov 2010 , in force 30 June 2011 and two accompanying Protocols
- *ASEAN Multilateral Agreement on the Full Liberalisation of Air Freight Services*, 20 May 2009, in force 13 October 2009 and two accompanying Protocols.

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## On Movement of Natural Persons

- *ASEAN Agreement on the Movement of Natural Persons*, 19 November 2012 (to come into force on ratification by 10 members, at 5 May 2015 Indonesia, Philippines and Laos have not ratified)
- Seven Mutual Recognition Agreements relating to specific occupational qualifications: accountancy, medical doctors, dentists, engineers, nurses, architects, surveyors.
- Timor-Leste will have to submit a Schedule of Commitments under the *Agreement on Movement of Natural Persons*

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## In the field of intellectual property

- *ASEAN Agreement on Intellectual Property Cooperation*, 15 December 1995 (will come into force when the 10th member, Malaysia ratifies) & Amending Protocol of 26 August 2014.

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## In the field of investment

- *ASEAN Comprehensive Investment Agreement*, 26 February 2009, in force 29 March 2012
- As amended by *Amending Protocol* 26 August 2014.
- + Schedules of Reservation Lists of existing measures excluded from Arts 5 (NT) and 8 (Appointment of Directors and Management).

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## Energy, Petroleum and Food Security

- *Agreement on ASEAN Energy Cooperation*, 24 June 1986, in force 1 January 1970.
- *Memorandum of Understanding on the ASEAN Power Grid*, 23 August 2007
- *ASEAN Petroleum Security Agreement*, 1 March 2009 (not in force until Indonesia ratifies)
- *Agreement on the Food Security Reserve*, in force 17 July 1980

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## On cross border transport issues:

- *ASEAN Framework Agreement on Multimodal Transport*, 17 Nov 2005, in force 1 Oct 2008 for 5 States
- *ASEAN Framework on the Facilitation of Inter-State Transport*, 10 Dec 2009, in force 30 December 2011 for 5 States
- *ASEAN Framework Agreement on the Facilitation of Goods in Transit*, 16 December 1998, in force 2 Oct 2000. (accompanying Protocols)

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## Acceding to existing FTAs with ASEAN Dialogue Partners

- ASEAN + China FTA (goods in 2004, services in 2007, investment in 2009)
- ASEAN + Japan FTA (goods in 2008)
- ASEAN + South Korea FTA (goods in 2006, services in 2007, investment in 2009)
- ASEAN + Australia and New Zealand FTA, 27 Feb 2009, in force 2010 (goods, services and investment)
- ASEAN + India FTA (goods in 2009, and agreements on services and investment signed in 2014, yet to come into force)

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## Regional Comprehensive Economic Partnership

- Between ASEAN and China, Japan, South Korea, India, New Zealand and Australia.
- Negotiations launched August 2012
- Covering trade in goods, trade in services, investment and other areas
- Will accession to RCEP be *before*, *simultaneous with* or *after* accession to ASEAN?

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#### Challenge # 4 What Schedules?

##### Uncertainties on the Extent of Commitments under the treaties: Negotiating Schedules to the satisfaction of other Members

- Schedule under *ASEAN Food Security Reserve Agreement*.
- Schedules under *ASEAN Agreement on Trade in Goods*.
- Schedules under *ASEAN Framework Agreement on Trade in Services*
  - Schedule of existing measure in derogation from MFN
  - Schedule of Specific Sectoral Commitments
  - Horizontal Section of Schedule of Specific Commitments
- Schedule under *ASEAN Agreement on Movement of Natural Persons*.
- Schedule of Reservation List under *ASEAN Comprehensive Agreement on Investment*.

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#### What will ASEAN Members require of Timor-Leste's Schedule under the *ASEAN Trade in Goods Agreement*?

- Schedule A (general list), Schedule B (ICT products) and Schedule C (Priority Sectors) must show dates for zero duties.
- Schedule D lists some Unprocessed Agricultural Products with duties 0% to 5%.
- Schedule E lists some Unprocessed Agricultural Products with reductions of MFN rates
- Schedule H is a list of products excluded from duty reductions for a reason in the general exception in Article 8
- Need to be comparable to other Members
- Blueprint aspirations to phase in sensitive and highly sensitive products are imprecise.
- Uncertain if ASEAN 10 will give new Schedules before 31 Dec 2015
- Would Timor-Leste give the same Schedules under ASEAN, ASEAN-FTAs, and RCEP be the same?

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## **What will ASEAN Members require of Timor-Leste's Schedule under the *ASEAN Framework Agreement on Services*?**

- Timor-Leste will need to give a Schedule of Commitments comparable to other ASEAN Members – or to the level of the least liberalized country, Cambodia.
- Indicated by 8<sup>th</sup> Protocol of Commitments from Oct 2010.
- Many commitments of all ASEAN Members do not permit supply through commercial presence of wholly foreign owned suppliers – there are min local equity requirements.
- Eg., Cambodia commitments leave out some sectors, and in covered sectors, schedules some restrictions.
- AEC Blueprint aspires to removing “substantially all restrictions on trade in services in all ... sectors by 2015”
- 2015 ASEAN Summit Declaration: that Members will sign a 9<sup>th</sup> Protocol of Commitments before 31 Dec 2015 – that will recalibrate the benchmark for Timor.-Leste.

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## **What will ASEAN Members require of Timor-Leste's Schedule under the *Agreement on Movement of Natural Persons*?**

- This field is shifted out of FAS into separate AMNP.
- Waiting for ratifications by 3 ASEAN states to enter into force.
- Timor-Leste should expect to have to schedule commitments relating to temporary entry and stay for:
  - Short term business persons
  - Persons establishing a commercial presence
  - Intra-corporate transferees of entities that have established a commercial presence in the categories of
    - Executives
    - Managers
    - Specialists
  - Service Suppliers being existing employees of entities not having a commercial presence but having a contract to supply a service to consumers in the territory, in the categories of executives, managers and specialists.
- A number of variables could be broadened or narrowed.
- Blueprint speaks of Free Flow of Skilled as one of the core elements of the ASEAN single market.
- But the AMNP does not constrain Members from limiting as to the internal employment market;
- The AMNP obligations are limited to the specific commitment in the Annex.

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## **What will ASEAN Members require of Timor-Leste's Schedule under the *ASEAN Comprehensive Agreement on Investment*?**

- Two rules under ACAI are subject to Reservation lists: NT rule and prohibition on requiring managers to be a particular nationality,
- Eg Laos reservation list includes:
  - A law prohibiting foreigners from owning land
  - A law requiring foreign investment licences & limiting duration of foreign investments
  - Several laws reserving sectors for citizens: traditional textiles, also meat industry, commercial fishing , fish processing, some food processing
- Art 9.1 requires Member to phase out their Reservation Lists in accordance with the 3 phases of the Strategic Schedule of the AEC Blueprint.
- How do we assess progress with reductions?
- No new Reservation Lists published
- Expectations of Timor-Leste might depend on what the other Members have done by 31 December 2015.

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### **Challenge #4 - What Changes to Laws: Eliminating Inconsistent laws and possible flexibilities**

- Elimination of Inconsistent Legislation
- No established procedure
- No guidelines for providing a Memorandum of Foreign Trade Regime
- From the (pre-Charter) accessions of CMLV to ASEAN there are no public records of CMLV having submitted a Memorandum of Foreign Trade Regime, nor of ASEAN Members scrutinizing existing laws of CMLV, or any Report at the conclusion of the Accession.
- But anticipated that the Working Party on the Accession of Timor-Leste of the ASEAN Coordinating Committee will want:
  - to be provided with a Memorandum of Foreign Trade Regime
  - To be satisfied that Timor-Leste has amended existing laws to remove any inconsistencies with any ASEAN treaty obligations
  - Or that the Protocol provide for removal of specific inconsistencies within specified timeframes.
- Uncertain what will be required on accession and the extent to which a transition period to remove inconsistencies may be permitted.

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## What changes to Laws?

- Customs duties are already low at 2.5% so minimal change is required.
- Sales tax breaches NT rule in ATIGA since it is applied only to imported goods
- Existing income tax concessions would breach NT rule in Framework Agreement on Services to extent applied to suppliers of services listed in Timor-Leste schedule since the thresholds for eligibility for tax concessions are lower for local investors than for foreign investors.

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## What Changes to Laws?

- Customs valuation – reducing the instances of challenges to declared values; will need to amend the Customs Act
- SPS Measures – ensuring that restrictions are only applied where they conform to international standard or are based on a scientific risk assessment / also developing capacity to certify that Timor-Leste product meets specified standards of other countries.
- Making a start on developing intellectual property laws, probably starting with trade mark law
- For sectors covered by services commitments, ensuring that economic needs tests are not applied to the grant of commercial licenses.

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## Any Questions?

- 1. ...This PPT available at [www.williamstradelaw.com](http://www.williamstradelaw.com)
- 2. ...
- 3. ...

