ASEAN Path

DFDL

RETAIL

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ASEAN BACKGROUND

This paper aims to provide a comprehensive overview of the diverse legal frameworks across ASEAN countries applicable to retailing and wholesale activities. Normally, these lines of business have to be understood in a more comprehensive way since many groups of laws might have an impact on an investment project such as: foreign direct investment ("**FDI**"), company law, competition law (see our ASEAN Path Issue #12), planning and building construction contract, environmental law, and land law. However, this 13th issue of ASEAN Path will only focus on direct and main laws and regulations.

"Free flow of investment regime is key to enhancing ASEAN's competitiveness in attracting FDI and intra-ASEAN investment."- OECD[1]

Since ASEAN is not a fully liberalized area of trade activities, many regulations and few exceptions might apply to your specific investment project. Therefore, we recommend that you contact our advisors to learn more about the peculiarities revealed by your specific sector of retail or wholesale.

ASEAN PATH is a series of white papers prepared by DFDL's experts aiming to assess, in more depth, compelling issues arising from the regional economic integration under the auspices of the Association of Southeast Asian Nations ("ASEAN") Economic Community Blueprint. The articles are based on an in-depth legal analysis of the local and ASEAN legal framework from the perspective of a practitioner assisting foreign and ASEAN investors in their investments and operations throughout various ASEAN Member States. All articles are accessible on our website: www.dfdl.com.

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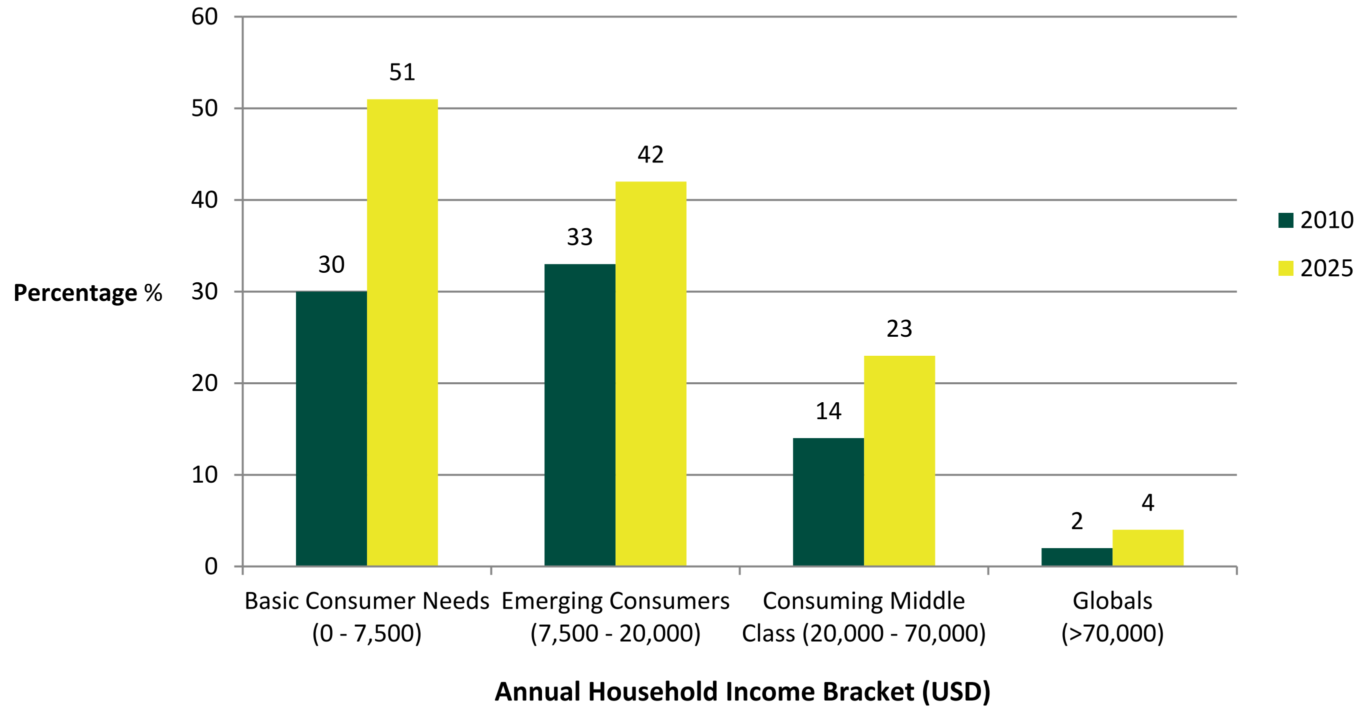
[1] OECD, Southeast Asia Investment Policy Perspectives (December 2014) online: <https://www.oecd.org /daf/inv/investment-policy/Southeast-Asia-Investment-Policy-Perspectives-2014.pdf>.

RETAIL AND WHOLESALE TRADING BUSINESSES within ASEAN: Key Elements to Know

The ASEAN Comprehensive Investment Agreement (the "**ASEAN Agreement**") signals the ASEAN Economic Community's willpower to carry out legal reforms aiming to standardize the diverse legal frameworks of its members in order to attract investment individually, but also together as an association suggested by the World Bank.[2] The Agreement provides general guidelines rather than a specific indication on how to implement changes by each member, partially explaining discrepancies within the community. While the objective of streamlining is evidently yet to be reached, some countries' legal systems are more liberalized than others. The World Bank, in 2014, declared the retail and wholesale sector to be the fourth most unrestricted sector in Southeast Asia ("SEA").[3] This fact combined with a high-growing potential in the consumption of goods within the area is leading to interesting opportunities for investors. In recent years, Southeast Asia has become a target as a distribution channel for many medium and large-scale enterprises and retailers. This trend is most likely to continue given the number of consumers from the middle class is expected to almost double by 2025 within ASEAN region (see Figure A).[4] Throughout this article, we will refer to the CBRE report "How Retailers are Active Globally?"[5] which considers worldwide retailers' preferred ASEAN countries as a target market for 2016.

Figure A: Shares of Consumers Households in each Income Bracket within ASEAN Region



* This research does not include Brunei Darussalam. Source: McKinsey Global Institute Cityscope database

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[2] World Bank, 2014, *East Asia and Pacific Economic Update April 2014: Preserving Stability and Promoting Growth*. Washington, DC: World Bank, p. 76.

[3] World Bank, 2016, *Doing Business 2016: Measuring Regulatory Quality and Efficiency*. Washington, DC: World Bank.

[4] Vinayak HV, Fraser Thompson, and Oliver Tonby, "Understanding ASEAN: Seven things you need to know" McKinsey&Company: Public Sector, online: <http://www.mckinsey.com/industries/public-sector/our-insights/understanding-asean-seven-things-you-need-to-know >.

[5] CBRE, "How Retailers are Active Globally?" (2016) 7 ed, online: <http://www.cbre.com/research-and-reports?PUBID=cbb1bc35-e8ac-40e3-bb9e-676597bd7923>.

Overview of the Retail Sector in ASEAN Countries

Table 1: Overview of the Retail Sector in ASEAN Countries	
Brunei Darussalam	– Business activities in Brunei Darussalam remain limited (wholesale and retail trade accounted for 3.69% in 2013 vs 2.97% in 2012[6] of the country's GDP). – Singaporean, Thai, and Malay retailers are preferred by Bruneians than local retailers. [7]
Cambodia	– In 2014, Aeon Mall opened and set international standards. – Soon, Phnom Penh will witness the opening of Parkson's Phnom Penh City Center, Lion Center shopping malls, and Hong Kong Land's Exchange Square plus another Aeon Mall.[8]
Indonesia	– Indonesia favors large retailing corporations with a minimum paid-up capital requirement. – Many global retailers have been entering the Indonesian market since 2015.[9]
Lao PDR	– Vientiane is welcoming an increase in shopping centers and department stores, such as: Lao World Group's Lao ITECC, Sky Supermarket, Latsavong Plaza, Vientiane Centre, Talatsao Mall, and Xang Jiang.[10]
Malaysia	– Retail activities are under the government's umbrella strategy and the Economic Transformation Programme (ETP) designed to drive investment opportunities. – Minimum capital requirements chill the establishment of branches of foreign companies to do business in the retail sector.
Myanmar	– Minimum capital requirement has been removed for local companies. – AEON Orange Co., Ltd. is operating supermarkets by a joint-venture agreement between a Japanese investor and local Burmese investors.
Philippines	– Foreign equity is accepted under certain conditions. – New laws will soon be enacted to liberalize the retail sector.
Singapore	– Singapore is a matured market with a strong presence of foreign retailers, department stores, and shopping centers. – Singapore is a highly selected market for foreign retailers due to the favorable investment climate of the country.
Thailand	– Thai law prohibits nominee practices, with a fine of up to THB 1 million and up to three years imprisonment for directors. – Thailand favors large retailers: the law requires more than THB 100 million worth of the registered and paid-up capital for five shops, and at least THB 20 million per additional shop.
Vietnam	– Vietnam is evidencing high rental fees and the licensing process is strenuous depending on the legal form of the enterprise – Many big brand names from the retail sector had successfully entered Vietnam's and intend to drastically increase the number of locations during the next five years.

[6] IMF, Statistical Appendix: Brunei Darussalam, IMF Country Report No. 14/19, online: <http://www.imf.org/external/pubs/ft/scr/2014/ cr14191.pdf>.
[7] Leo Kasim "Local retailers lose out to Singapore, Malaysian shopping centers" The Brunei Time (13 April 2015), online: <http://www.bt.com.bn/business-national/2015/04/13/local-retailers-lose-out-singapore-malaysian-shopping-centres>.
[8] CBRE, *supra* note 5.
[9] Cushman & Wakefield Research Publication, Main Streets across the World 2015/2016 (2015-2016) p. 14 online: <http://www.cushmanwakefield.com/en/research-and-insight/2015/main-streets-across-the-world-2015/.>.
[10] Luc Citrinot "Lao Government Wants to See More Foreign Owned Shopping Malls" (27 October 2015) online: <http://asean.travel/ 2015/10/27/lao-government-wants-to-see-more-foreign-owned-shopping-malls/>.

CAMBODIA

Ranking for Retailers as Targeting ASEAN Market

7/8

For the period of 2011 to 2015, the Cambodian economy has been growing by seven percent (7.0%) to seven point four percent (7.4%) per annum.[11] Cambodia's relevant laws and related sub-decrees in respect of retail and wholesale activities create a favorable environment to implement and operate a business.

Generally, there are few limitations on foreign control and none in relation of the retail and wholesale sector. The Law on Commercial Enterprises guarantees equal treatment between locals and foreigners. The current legal and regulatory landscape was originally set out by the Investment Law 1994 ("**Investment Law of 1994**") and amended in 2003 becoming the Amended Law on Investment ("**Amended Law on Investment**").

Amendments have eased the licensing process, by creating an automatic approval system of investment projects and implementing a completion timeframe of 31 working days in addition to authorizing wholly foreign-owned enterprise ("**WFOEs**"). Once the relevant authority (Council for the Development of Cambodia ("**CDC**")/Provincial-Municipal Investment Sub-Committee ("**PMIS**")) grants its approval, the project becomes a Qualified Investment Project ("**Qualified Investment Project**"). Then, the investor must apply for a Final Registration Certificate ("**FRC**") in accordance with the Amended Law on Investment. Neither retail nor wholesale projects are entitled to receive investment incentives as a Qualified Investment Project, as this sector is listed in Section 2 of Annex 1 of Sub-Decree No. 1111 ("**Investment Activities Not Eligible for Incentives**").[12] Nonetheless, an investor might consider that their investment is protected from discrimination[13] and nationalization[14] when calculating risk and benefits associated with an investment project.

According to CBRE's research, only two percent of the surveyed companies are targeting Cambodia, as a welcoming host country for their retail investment projects, despite the fact that the country presents one of the lowest access costs in the ASEAN region.

However, a number of major shopping malls are currently under construction (Parkson's Phnom Penh City Centre and Lion Centre shopping malls and Hongkong Land's Exchange Square, as well an additional Aeon Mall complementing the one recently opened) in Phnom Penh might notably increase this data for the upcoming years.[15] In addition, the country has been attracting a significant number of tourists in recent years, which is favorable to retailing businesses.

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[11] ADB, "Cambodia Economy" online: < https://www.adb.org/countries/cambodia/economy >.
[12] Chapter 5 of the Amended Law on Investment provided investment incentives for many other projects, please consult our tax and legal advisors for further details.
[13] *Law on the Amendment to the Law on Investment of the Kingdom of Cambodia*, 24 March 2003, Article 8; Applicable provision on National Treatment of Bilateral Investment Agreements to which Cambodia is a signatory.
[14] *Law on the Amendment to the Law on Investment of the Kingdom of Cambodia*, 24 March 2003, Article 9; Applicable provision on Expropriation of Bilateral Investment Agreements to which Cambodia is a signatory.
[15] Siv Meng, "What will be the future of Phnom Penh's malls?" (30 April 2015) online: < http://www.phnompenhpost.com/real-estate/what-will-be-future-phnom-penhs-malls >.

INDONESIA

Indonesia has a strong appeal for foreign retailers.[16] The government wants to increase the regional competitiveness of the country and boost its FDI as announced on 11 February 2016 with the tenth Economic Package. In accordance with that announcement, the Decree No. 44 of 2016 ("**New Negative List**") has been enacted replacing the former Negative List of 2014.[17] The new provisions apply to new investments approvals to be issued from the date of enactment (18 May 2016 and onwards).[18] This New Negative List introduces great changes with respect to the retail activities in comparison with the previous Negative List.

Currently, the New Negative List creates three categories of business activities:

- Completely closed to FDI;
- Partially open to FDI; and
- Open to FDI but subject to certain conditions.

Fewer trade activities are comprised under the category of "business fields that are open under certain conditions".[19]

Retail store

Under the previous Negative List 2014, no retail store with a retail area smaller than 1200 square meters could be foreign invested. However, this retailing business line has been further relaxed with the enactment of the New Negative List, now authorizing a maximum of sixty-seven percent (67%) of foreign investment in a company operating a department store with a surface area between 400 and 2000 square meters if located in a mall.[20] Additional outlet stores are subject to an approval based on an export performance. Before 18 May 2016, no foreign investor could operate a department store of a surface area less than 2000 square meters. Perhaps, the sale of specific goods in a specialized store is still closed to foreign investors.[21]

A supermarket with a retail space of more than 1200 square meters will not be subject to any local content. The same rule shall also apply to minimarkets with a retail space of more than 400 square meters (including convenience stores and community stores).

Distribution

The distribution business, if not affiliated to the production, can have a foreign ownership of sixty-seven percent (67%) this represents an increase of thirty-four percent (34%) from the Negative List of 2014. However, if the distributor is affiliated with the production process, there is no minimum level a local ownership. Therefore, foreign investors are free to operate such business.

Liquor Retail Business

The liquor retail business and the sidewalk vendor liquor business are not subject to any ownership restrictions. Perhaps, two supplemental conditions apply to these business lines. A Business License Certificate of Liquor (SIUP-MB) has to be obtained along with a distribution network and specific place.

Retail trading via mail order or internet

Retail trading via mail or internet order is now a business line opened subject to certain conditions. Hence, subject to a partnership with domestic SMEs,[22] investors could carry such activities for a variety of products such as: foods, beverages, tobacco, pharmacy, cosmetics, laboratory devices, textiles, apparel and footwear, household, and kitchen goods.

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[16] According to the report of Global Retail Development Index from the firm ATKearney, it ranks as the fifth developing country offering the best opportunities with regards to retail investment. See online < https://www.atkearney.com/consumer-products-retail/global-retail-development-index/full-report//asset_publisher/oPFrGkbIkz0Q/content/global-retail-expansion-at-a-crossroads/10192 >.

[17] Presidential Regulation No. 39 of 2014 on the List of business lines that are closed for investments and business lines that are open with limitations for investments ("Negative List of 2014").

[18] The grandfathering rule applies. In other words, the amendments are not applying retrospectively to existing companies, unless the new provisions of the new Negative List are more profitable to them.

[19] Appendix III.

[20] A license still has to be obtained from the Ministry of Trade.

[21] Business of car, motorcycle, and commercial vehicle, spare-parts and accessories of car, motorcycle and commercial vehicle, jewelry, antique, water transportation equipment and accessories, textile, games and toys in stores, cosmetic, footwear, electronic, etc.

[22] Law No. 20 Year 2008 concerning Micro, Small and Medium Scale Enterprises and the Regulation No. 17 of 2013 concerning the implementation of Law No. 20 of 2008 concerning Micro, Small, and Medium-scale Enterprises.

E-commerce transaction providers

Finally, electronic commerce transaction providers (platform-based market place, daily deals, price grabber, and online classified advertising) with an investment value less than IDR 100 million can be foreign invested of a maximum forty-nine percent (49%)., If the investment is of a value more than IDR 100 million there is no restriction with regards to foreign capital.

Finally, it remains to be seen if the grandfather protection will apply unconditionally or partly to the New Negative List. The grandfather protection is usually a clause that protects acquired rights, in case amendments to the law or regulation are less advantageous. For instance, it is not clear if the grandfather protection will apply to projects that have been submitted but not yet approved prior at the time of the enactment of the New Negative List. The latter does not provide any details on which Negative list and threshold of foreign capital investment will govern the application files that were pending for approval at the moment of the enactment. Hence, if it applies without any conditions, the old rule would continue to apply to active businesses, while the new rule will govern all future businesses. However, the uncertainty does not affect the retail business activities since the New Negative List has liberalized all sub-activities by providing more liberal foreign capital thresholds.

Ranking for Retailers as Targeting ASEAN Market **8/8**

Since June 2015, foreign entities have been allowed to carry out retail and wholesale business activities within the Lao PDR, upon approval, pursuant to the Decision No. 1005/MOIC.DTD on Wholesale and Retail Businesses, issued on 22 May 2015 ("**Decision No. 1005**"). Limitations remain, but Decision 1005 departs from the former legislation set out in the Decision 0977/MOIC.DTD, dated 18 May 2012 which provided that foreign investors could only participate in a limited scope of specific wholesale activities through a joint venture with a Lao partner. Retail activities were completely closed to foreigners and approval to conduct wholesale activities as a foreign joint venture was difficult to obtain.

The Decision on Shopping Centers and Department Stores No.1950/MOIC. DDT, dated 22 September 2015 ("**Decision No. 1950**"),[24] further opened up the wholesale and retail sector, permitting foreign investment in the business of shopping center development. Of note, foreign investors seeking to develop shopping centers and department stores are subject to high total capital requirements and minimum construction size requirements, in addition to the registered capital requirements as set forth in Decree 1005.

The Actual Regime

2 Regulatory Approvals

1. Location: the Department of Industry and Commerce ("**DOIC**") for the relevant area will verify if the proposed location for wholesale or retail distribution is aligned with town and municipal plans to ensure it can also facilitate customers in loading goods, parking spaces, and ensuring safety. The approval of the DOIC is required for each wholesale or retail outlet to be developed.

2. For investors looking to develop a shopping mall, shopping center, and department center Decision 1005 provides the following basic requirements and limitations:
   - Restriction on foreign ownership in regards to the value of the investment in the shopping mall or shopping center;
   - Restriction on foreign ownership in regards to the size of the shopping center;
     - Requirement for sufficient area in respect of the intended construction project: shopping centers projects must reserve a minimum space of 50,001 square meters.
     - Hypermarkets must reserve a space measuring 20,001 to 50,000 square meters.

Table 2: Conditions for the Establishment and the Operation of Retail or a Wholesale Business and Shopping Center by Foreigners

Foreign Investors	Minimum Registered Capital (LAK)	Value of the shopping center or the shopping mall (LAK)
100% foreign shareholding	Minimum 20 billion	Minimum 160 billion
Joint venture with local and foreign shareholders (wherein the foreign shareholding <70%)	10 billion – 20 billion	80 billion < 160 billion
Joint venture with local and foreign shareholders (wherein the foreign shareholding < 50%)	4 billion – 10 billion	80 billion < 8 billion
Joint venture where the foreign shareholder holds a minority of shares	Minimum 4 billion	N/A [23]

[23] Reserved only to Lao Citizens as provided in the Law on Lao Nationality (see Decision No. 0515/MoIC.DTD).
[24] Entered into force on 13 October 2015.

Pursuant to Decision No. 1005, the foreign shareholding restrictions apply to the following business activities: contractual wholesale and retail, agent-based wholesale and retail, resale-based wholesale and retail, and franchise-based wholesale and retail.

Pursuant to Decision No. 1950, small-scale investment in the wholesale and retail sector is reserved solely for Lao nationals and 100% Lao invested companies. Any investor seeking to acquire a company in the wholesale or retail sector will need to comply with the requirements above and obtain approval from the MOIC.

WFOEs or joint ventures with Lao investors existing before the promulgation of Decree No. 1005 may continue their business operations, subject to an incremental increase of the registered capital of such companies in order to be consistent with Article 30 of the Decision (see Table 3).

Table 3: New Mandatory Capital Injections for Existing Businesses Operating in Lao PDR

Duration of the extended business operation	Amount to be injected (LAK)
3 years	20 billion
2 years	10 billion – 20 billion
1 year	4 billion – 10 billion

MALAYSIA

Ranking for Retailers as Targeting ASEAN Market

2/8

Malaysia presents the highest paid up capital requirement among all Southeast Asian economies as for the implementation of retailing and wholesale business, regardless of the specific type of activities. However, this does not prevent the fact that the country ranks as the second most preferred host country by foreign investors to operate retail activities in Southeast Asia. Perhaps, the wholesale and retail sector is found in the Malaysia government list that is driving key investment opportunities. The list, being part of the Economic Transformation Programme, is commonly referred to as the National Key Economic Area ("**NKEA**"). Oddly, various legal provisions highly restricting the sector remain in force. The authority in control of licensing is the Ministry of Domestic Trade, Cooperatives and Consumerism. These numerous restrictions are laid out in respect of many different areas such as labour, land, corporate, and licensing matters.

Table 4	
Available Distribution Formats	Minimum Capital Requirement
Hypermarket	RM 50 million
Departmental Store	RM 20 million
Superstore	RM 25 million
Specialty Store	RM 1 million for each outlet

Some Specifications Regarding the Licensing

- Each activity has its own set of specifications, for example: only companies operating a hypermarket may apply to operate in a superstore format.
- Regarding department stores, indicative plans for additional branches of departmental stores need to be submitted to the MDTCC two years before an application is to be considered.
- No project shall be authorized if located within a 3.5 km radius of residential areas.
- A specialty store is a store dealing with one main brand name, product, or line of goods associated with one product (electrical appliances, healthcare products, footwear, clothing and apparel, sports goods, electronic goods, and pharmaceutical products).
- The approval of the MDTCC is granted if the proposed activities meet the following requirements:

  - Contribution to the socio-economic development of Malaysia;
  - Generate substantial foreign direct investment;
  - Absence of local players in proposed formats;
  - Create employment opportunities;
  - Transfer of technology and skills; and
  - Unique and exclusive nature of business.

Non-exhaustive List of Requirements

Many requirements regarding the composition of the board of directors, the personnel at the management level and employees with disabilities, have to be respected. The government of Malaysia protects its market mostly with "Bumiputra" equity that allows foreigners to hold up to thirty percent interest in the company. In some instances, the government may allow higher ownership for the first few years of operation, but will require the company to reduce its equity holdings to thirty percent or below. Any additional branch is subject to the approval of the MDTCC and must satisfy the minimum capital requirement. In addition to the above, companies need to be aware that the negative list approach is also adopted by the Malaysian government.

Therefore, no foreign involvement is allowed in the following sectors:

- Supermarkets/ mini markets (less than 3,000 square meters sales floor area);
- Provision shops/general vendors;
- Convenience stores (that opens for business for 24 hours);
- Newsagents and miscellaneous goods stores;
- Medical halls (inclined towards traditional alternative medicines plus general dry foodstuff);
- Fuel stations with or without convenience store;
- Permanent wet market stores;
- Permanent pavement stores;
- In relation to national strategic interest; and
- Textile shops, restaurants (non-exclusive), bistros, and jewelry shops.[25]

[25] Ministry of Domestic Trade Co-operative and Consumerism, "Guidelines on Foreign Participation in the Distributive Trade Services Malaysia" online: < http://www.kpdnkk.gov.my/images/KPDNKK/PDF/Borang/WRT_Guideline.pdf> p. 16-17.

MYANMAR

The general prohibition for foreign companies to carry on import and trade activities in Myanmar has recently been subject to few relaxations. Since early 2015, the Myanmar government has started to create a more favorable legislative climate to spur foreign investment. The Notification 29/2014 issued under the Foreign Investment Law 2012 does not provide any restrictions on trading activities on a case by case basis. Hence, business activities not listed in this notification, such as retailing should be allowed to be WFOEs. In practice, the MOC does not apply the Notification 29/2014. Hence, specified other notifications should be considered.

Ranking for Retailers as Targeting ASEAN Market

N/A

The Notification No. 33 of 2016 allows foreign car companies to establish a joint venture company under the Myanmar Companies Act with a local partner, without any shareholding requirements for the local partner. Hence, a joint venture company can import and sell brand new automobiles through a car showroom under certain conditions, such as a license from the MOC.

Moreover, foreign-owned companies may be established in the Thilawa Special Economic Zone and engage in import and wholesale trading activities pursuant to the Instruction No. 02 2015. This instruction from the Management Committee of the Thilawa Special Economic Zone allows retailers to reach the greater market of the whole country providing that they respect certain conditions. These conditions are in regards to the minimum invested capital, the establishment of a warehouse within the Thilawa SEZ, and the introduction of value-added manufacturing processes or services.

The Notification No. 96 2015 from the MOC removed restrictions on the sale of certain products provided that the foreign investor is operating in a joint venture with Myanmar citizens. Fertilizers, insemination seeds, pesticides, and hospital equipment are the listed products in Notification No. 96. The MOC may amend this list, as needed. Moreover, Notification No. 56 2016 issued by the MOC allows foreign companies to establish a joint venture with a Myanmar partner to engage in trading activities in relation to construction materials.

The most recent Notification No. 26 (“**Negative List**”) from the government does not provide for any explicit restrictions on trading activities, such as investing in shopping centers. Moreover, Section 2 of this notification stipulates that retail trade and investment into shopping centers can be carried out by a WFOE. The Landmark, a 10-acre high-end real estate project development located in Yangon, will provide numerous opportunities for retailer spaces.

In conclusion, diverse legal instruments seem to be gradually allowing foreigners to engage in trading activities in Myanmar, but it remains to be seen if the practices will be consistent with the Negative List.

THE PHILIPPINES

Contributed by Ocampo & Suralvo Law Offices, Philippines

Philippine retail trade has been historically reserved to Filipinos, but a decade and a half ago, significant reform to the Philippines retail trade industry was introduced with the enactment of Republic Act No. 8762: the Retail Trade Liberalization Act 2000 ("**RTLA**").[26] The RTLA liberalized retail trade to "encourage Filipino and foreign investors to forge an efficient and competitive retail trade sector."[27] Foreign participation in the retail trade business is allowed, subject to minimum paid-up capital, and other requirements.

The RTLA still generally reserves participation in retail trade exclusively to Filipino enterprises, but it allows foreign participation if equity requirements are met. Under the law, foreign retailers are permitted to engage in retail trade in the Philippines under the following categories, and subject to these minimum capitalization requirements:

- **Category B** – minimum paid-up capital of the equivalent in Philippine pesos of USD 2.5 million; and investments per store of not less than the equivalent in Philippine pesos of USD 830,000.

- **Category D** – minimum paid-up capital of the equivalent in Philippine pesos of USD 250,000 per store for enterprises engaged in selling high-end or luxury products.

Foreign retailers must likewise meet the following pre-qualification requirements:

- A minimum of USD 200 million net worth in the parent corporation for Category B, and USD 50 million net worth in the parent corporation for Category D;
- Five retailing branches or franchises in operation anywhere around the world unless such retailer has at least one store capitalized at a minimum of USD 25 million;
- Five-year track record in retailing; and
- Having been formed or incorporated in countries which allow the entry of Filipino retailers.

Note also that under the RTLA, retail trade enterprises under Category B in which foreign ownership exceeds eighty percent (80%) of equity are required to offer a minimum of thirty percent (30%) of their equity to the public through any stock exchange in the Philippines within eight (8) years from their start of operations.

In recent years, business groups and chambers have lobbied for further liberalization of the law, especially the elimination of the public share offer rules. There are also calls to lower the Category B and D investment thresholds. Bills have been filed in the Philippine Congress for further liberalization, but these failed to progress through the 16th Congress. As of this writing, these bills have not been refiled for the deliberation and enactment of the current 17th Congress. Favorable conditions are however expected in the coming years as the President of the Philippines vowed to remove significant foreign investment restrictions. It is expected that retail trade will be among the sectors that will be fully liberalized.

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[26] The RTLA repealed the Retail Trade Nationalization Law (Republic Act No. 1180) enacted in 1954 which restricted the retail sector to Philippine nationals.
[27] Section 2, RTLA.

SINGAPORE

CBRE's survey concluded that twenty-one percent (21%) of the companies surveyed intend to establish retail activities in the country for the year 2016. The same survey, and non-specific to Singapore, pointed out that the profiles of the investors for SEA are principally involved in mid-range fashion (23%), luxury business (23%), specialist clothing (18%), and health and beauty (10%).

Ranking for Retailers as Targeting ASEAN Market
1/8

The strong presence of foreign retailers in Singapore reflects the city state's open and favorable foreign investment climate. Firstly, there is no restriction on foreign ownership. Secondly, the process of incorporation is well-established and highly transparent with an electronic database for registration with the Singapore Companies Registrar ("**ACRA**"). Only requirements in respect of residency for the director[28] and the company's secretary[29] are applicable along with the minimum requirement of one shareholder (individual or corporate entity).

Licenses also need to be obtained in order to set up a retail outlet in Singapore, depending on the type of activities (supermarkets, pharmacies, telecoms stores, liquor, and cosmetics). Licenses are mainly in respect of public health, environment protection, and security concerns. For example, for retail of cosmetic products, the Health and Sciences Authority has to be electronically notified before placing a product on the market. A fee is related to each registration and varies in respect of the type of products. The degree of risk associated with a product determinates the registration fee (for example eyes products notifications will be greater than moisturizers).The Singaporean retail market is matured and has not yet saturated. As Singaporeans and travelers combined together have a great consumption power, business opportunities remain interesting and notably explain why the country is the most preferred place for investors to implement retail businesses in 2016 according to CBRE's survey.

[28] There must be at least one director who must be a Singapore resident, i.e. a Singaporean citizen, a Singapore permanent resident or a foreign individual holding a valid Employment pass. There is no limit on the number of additional foreign or local directors that can be appointed, but most of the companies will have at least two (2) directors for convenience of fulfilling requirements from banks or other financial institutions.

[29] He/She must be a Singapore resident and qualified to hold the position. Under Singapore law, every company must appoint a secretary within 6 months of the date of its incorporation. The company secretary is the person who ensures compliance with the regulations affecting companies. The company secretary keeps the necessary registers, sends out notices and organizes meetings, takes down minutes and files whatever forms are required by ACRA.

The current legal framework applicable to foreigners who are proposing to carry on a retail or wholesale business in Thailand is laid out in the Foreign Business Act of 1999 B.E. 2542 (“**FBA**”). If more than fifty percent (50%) of a company’s shares are owned by a foreign entity or individual, that company will be considered a foreign-owned company in Thailand. An annex to the FBA lists the following three categories of businesses in which foreigner participation is restricted:

- List 1 is completely prohibited for a foreigner to engage in any business listed in the schedule.

- List 2 lists businesses relating to security, culture, natural resources, and the environment. A foreigner may operate the business, but it is subject to permission granted by the Minister of Commerce (“**MOC**”), and provided that two-fifths of its directors must be Thai nationals and at least forty percent (40%) of its total shares must be held by Thai nationals.

- List 3 lists businesses in which Thais are not yet ready to compete with foreigners. Permission from the Director-General of the MOC must be obtained. List 3 includes all types of service activities.

The retail and wholesale business can be found in List 3, under subparagraph 14. Therefore, it is theoretically possible for a WFOE to engage in a retail or wholesale business with the approval of the Foreign Business Registrar of the MOC. However, such approvals are rarely granted for retail businesses. However, approvals for wholesale businesses in certain specific sectors (medicine and machinery) are more likely to be granted.

An exception is possible from the foregoing approval requirement if the entity in at least THB 100 million (approximately USD 2.7 million) as share capital to carry on the retail activity. This approval will cover up to five retail shops, after which an additional THB 20 million is required per additional shop.

Wholesale activity has a similar THB 100 million minimum capital requirement, which applies separately from the retail minimum capital requirement. The European University Institute of Florence in Italy expects a growth of Thai retail annual sales ranging from 3.4 to 4.3 percent until 2018.[30]

[30] Oxford Business Group, Thailand Industry and Retail Research & Analysis (2016) online: <http://www.oxfordbusinessgroup.com/ thailand-2016/industry-retail>.

VIETNAM

Legislative Background

Vietnam's legal framework with respect to foreign investment is subject to ongoing reform since 1986. According to the General Statistics Office of Vietnam, for the first eight months of 2016, the total estimated retail sales of consumer goods and services reached an amount of VND 2307.7 trillion.[31] The former law on Foreign Investment in Vietnam has been amended few times. The current version of the Law on Investment ("**LOI**"), dated 26 November 2014 and its regulations constitute another step towards the liberalization of the retail sector. The necessary requirements in order to carry out retail and wholesale activities within the country are summarized below.

Forms of Business

According to the Report of the Working Party on the Accession of Viet Nam to the World Trade Organization ("**WTO**") dated 27 October 2006 and its Schedule of Specific Commitments in Services circulated in document WT/ACC/VNM/48/Add.2, since 1 January 2009, foreign investors are allowed to invest in Vietnam's retail market by setting up a one hundred percent (100%) owned subsidiary in Vietnam or setting up a joint venture with Vietnamese partner or purchasing share or capital in Vietnamese enterprises. In addition, foreign investors may also consider franchising.

Licensing

In the local subsidiary option, the foreign investor must obtain the Investment Registration Certificate ("**IRC**"), the Enterprise Registration Certificate ("**ERC**") and the Business License for goods trading activities ("**BL**"). As such, the first crucial step is obtaining an IRC from the licensing authorities. When the sector of activities chosen by the investor falls under the list of conditional sectors, the investment will be evaluated by the relevant licensing authorities. For example, retailing activities are part of the Appendix 4 of the LOI: List of Conditional Investments. However, some products cannot be subject to retail activities, such as tobacco, pharmaceutical products, oils, and newspapers. Elements that are to be considered by licensing authorities, ministries, and other authorities when granting an IRC are: business size, scale, location, and type of investment.

Once the IRC has been granted, the relevant documents have to be submitted to the licensing authority in order to obtain the **ERC** for enterprise registration.. Finally, a BL has to be granted in order to start the operation of the activities of the retail business. The application dossiers for the IRC and the BL should clearly state the HS codes of the goods that the local subsidiary is going to distribute by retailing.

In the share purchase option, the foreign investor must obtain a pre-approval on the purchase of share or capital in the local target enterprise issued by provincial Department of Planning and Investment. After the share or capital has been purchased by the foreign investor, the enterprise shall proceed with the ERC amendment procedures to record new owner(s) or change to the registered business registration content and obtain the BL.

The Vietnamese government created the Economic Needs Test ("**ENT**") as a tool to aid local development. It is applicable to any outlet besides the first outlet, unless such outlet falls under the scope of the exceptions. Many factors are to be examined under the ENT such as:

- Number of service providers;
- Market stability;
- Geographic scale;
- Population density in the proposed city or province; and
- Alignment between the investment project and local planning.

The previously mentioned exceptions to the application of the ENT for a second outlet has to be located in an area planned for purchasing goods by provinces, municipalities, having complete infrastructure and to cover an area of less than five hundred square meters. This procedure thwarts investor's projects to lead major retailing projects in Vietnam. Consequently, a franchising avenue may be more appealing for retailers proposing to carry on business in Vietnam. In 2010, Vietnam evidenced the highest rent of retailing space within SEA. In 2015, Ho Chi Minh's retailing rent ranked second highest across ASEAN. In summary, the fast growing retail landscape in Vietnam presents a modern distribution network comprising of domestic and foreign players.

[31] General Statistics Office of Vietnam, "Socio-economic situation in eight months of 2016", online: <https://www.gso.gov.vn/default _en.aspx?tabid=622&idmid=&ItemID=16038>.

CONCLUSION

This article aimed to offer an overview and outline the recent developments of the diverse legal frameworks across ASEAN countries applicable to retailing and wholesale activities. Since ASEAN is not a fully liberalized area of trade activities (see the figures below), many regulations and few exceptions might apply to your specific investment project. Therefore, we recommend that you contact one of our advisors to learn more about the peculiarities revealed by your specific sector of retail or wholesale.

Restricted **Liberalized**

Medias Telecommunication Transport Retail Tourism Construction Manufacturing

Table 5 : Incentives and Considerations for Foreign Investments in ASEAN Countries

	Incentives	Considerations
Brunei Darussalam	– Substantial retail opportunities for Halal products.	– Purchasing power is relatively low.
Cambodia	– No restriction on foreign ownership. – Corporate tax holidays of up to 8 years; 20% corporate tax rate after the incentive; duty-free import of capital goods, no restriction on capital repatriation.[32] – Expected economy's growth for the next years will set proper conditions for good business opportunities.	– Underdeveloped transportation systems may cause losses and delays regarding shipping processes.[33]
Indonesia	– Large scale retailers are expected to substantially expand. – Retail sales volumes are also expected to grow for at least 5% per year until 2018.[34]	– Limit of licenses issued by the government. – There is limited quality retail space and this is supporting rental growth which saw a positive growth of 2.9% last year.[35]
Lao PDR	– ASEAN Integration and the power economic sector are favorable in the Lao PDR. – Changes in the regulatory framework allowing foreign investment in the wholesale and retail sector will provide first mover advantage to foreign companies.	– Small and medium size retail business can only be owned by Lao nationals. – Requirement of Lao citizens' employees in store.
Malaysia	– Double-taxation treaties with many countries such as Singapore, France, Luxembourg, United Kingdom. – No withholding tax on dividends payable by Malaysian companies.	– Currency fluctuations. – Substantive minimum capital requirements.
Myanmar	– Electrical connection is easier since the government reduced the number of approvals required. – Better quality of retail space. – Growing number of shopping centers. – Low rental fees.	– Purchasing power is relatively low. – Local consumers' habits remain traditional and they prefer shop houses, local markets, and kiosks. – The country is more prone to exporting.
The Philippines	– Positive change in consumer behavior. – Possible full liberalization of the sector under the current President's investment reform program.	– Fastest growth of retail spaces rent across the ASEAN region. – Only companies with 5 years of experience are allowed to enter the market.

[32] Embassy of the United States in Phnom Penh, Doing Business in Cambodia, online: <http://cambodia.usembassy.gov/business.html>.
[33] Khmer Time, "Cambodia's retail market booming", online: <http://www.khmertimeskh.com/news/1565/cambodia-s-retail-market--booming/>.
[34] PwC, online: <http://pwccn.com/webmedia/doc/635593366079020650_rc_outlook_201516_indonesia.pdf>.
[35] Cushman & Wakefield Research Publication, Main Streets across the World 2015/2016 (2015-2016) p. 14 online: <http://www.cushmanwakefield.com/en/research-and-insight/2015/main-streets-across-the-world-2015/>.

Thailand	– Retail businesses are not eligible for investment promotion. – A wholesaler that trades internationally may be able to establish as an International Trading Center and enjoy associated tax and non-tax incentives.	– No right to own land assets, except in cases of special permission for specific business, such as obtaining investment promotion from the Board of Investment, or operating a business in the area of Industrial Estate Authority of Thailand.
Singapore	– No restriction on foreign ownership. – Tax incentives for retailers. – Double-taxation treaties with many countries.	– Facing many challenges in recent years such as high competition with e-commerce, high rental costs, high labour costs, and a tight labour market. [36]
Vietnam	– The liberalization of the economy has attracted many foreign brands. – The most "dynamic" sectors are food & beverage and consumer products.[37]	– Lengthy and arduous licensing procedures. – Joint venture or foreign owned subsidiary is not advised if more than one retailing outlet is projected.

[36] See Kit Tang, "Are global brands throwing in the towel in Singapore" (27 January 2015) CNBC online: <http://www.cnbc.com /2015/01/27/global-retailers-face-challenge-in-singapore.html>.

[37] Cushman & Wakefield Research Publication, Main Streets across the World 2015/2016 (2015-2016) p. 15 online: <http://www.cushmanwakefield.com/en/research-and-insight/2015/main-streets-across-the-world-2015/.>.

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