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Best Practices in Post-Negotiation Implementation: The Case of Thailand

Submitted by: Thailand



**Capacity Building Workshop on Regional
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Negotiation Skills on Transparency
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THAILAND

Best Practices in Post-negotiation Implementation: the case of Thailand



APEC Capacity Building Workshop on RTA/FTA
Negotiation Skills on Transparency

14 January 2022

Thailand's FTAs



- **14 currently in effect**
- **3 under negotiation**
- **more being considered**

Thailand's FTAs



	<u>Date of entry into force</u>	
ASEAN	1 January	1993 (goods)
	30 April	1999 (services)
	21 June	1999 (investment)
Thai-India	1 September	2004
Thai-Australia	1 January	2005
Thai-New Zealand	1 July	2005
ASEAN-China	20 July	2005 (goods)
	1 July	2007 (services)
	15 February	2010 (investment)
Thai-Japan	1 November	2007
ASEAN-Japan	1 June	2009 (goods)
ASEAN-ROK	1 June	2009 (services)
	1 January	2010 (goods)
	31 October	2009 (investment)
ASEAN-India	1 January	2010 (goods)
	1 July	2015 (services/investment)
ASEAN-Australia-New Zealand	12 March	2010
Thai-Peru	31 December	2011 (goods)
Thai-Chile	5 November	2015 (goods/services)
ASEAN-Hong Kong, China	11 June	2019 (goods/services)
RCEP	1 January	2022

Transparency provisions in Thailand's FTAs

- All of Thailand's FTAs so far contain transparency provisions. In terms of structure and content, these can be grouped into 3 categories:
 - 1) **Article X of the GATT 1994** is incorporated and form part of the agreement *mutatis mutandis*, e.g. ASEAN-China FTA, ASEAN-ROK FTA
 - 2) Incorporation of GATT 1994 Article X **with some additional WTO-plus elements** such as making laws and regulations available on the internet, e.g. ASEAN-Australia-New Zealand FTA
 - 3) **Standalone transparency chapter** with several WTO-plus elements, e.g. Thai-New Zealand FTA, Thai-Chile FTA

Transparency in the domestic legal context

Domestic legal/regulatory context has important implications for post-negotiation implementation of transparency provisions in RTAs/FTAs

- **As part of its broader domestic development agenda, Thailand has been undertaking important regulatory reforms which focused on establishing a modern system of regulatory governance that includes regulatory oversight and improved use of good regulatory practices (GRPs).**
- **These are enshrined in Section 77 of the 2017 Constitution of Thailand.**

Transparency in the domestic legal context: 2017 Constitution and regulatory reform

GRPs are a KEY component of the 2017 Constitution of Thailand, Section 77 of which reads as follows:

[para1] “The State should introduce laws only to the extent of necessity, and repeal or revise laws that are no longer necessary or unsuitable to the circumstances, or are obstacles to livelihoods or engagement in occupations, without delay, so as to abstain from the imposition of burdens upon the public. The State should also undertake to ensure that the public has convenient access to the laws and are able to understand them easily in order to correctly comply with the laws.”

Section 77 of the 2017 Constitution of Thailand (cont.)

[PARA2] “Prior to the enactment of every law, the State should conduct consultation with stakeholders, analyse any impacts that may occur from the law thoroughly and systematically, and should also disclose the results of the consultation and analysis to the public, and take them into consideration at every stage of the legislative process. When the law has come into force, the State should undertake an evaluation of the outcomes of the law at every specified period of time, for which consultation with stakeholders shall be conducted, with a view to developing all laws to be suitable to and appropriate for the changing contexts.”

Transparency in the domestic legal context: 2017 Constitution and regulatory reform

- To implement Section 77 of the 2017 Constitution, the Act on Legislative Drafting and Evaluation of Law was passed in 2019.

ACT ON LEGISLATIVE DRAFTING AND EVALUATION OF LAW B.E. 2562 (2019)

- establishes the requirement for government agencies to enact laws to the extent necessary and repeal or reform laws no longer needed, outdated, or cause burdens to the people
- requires government agencies to use **regulatory impact assessment (RIA)** and conduct **public consultation** through the central system before every legislative drafting process, **publish** the means adopted, the time period open for consultation and other relevant information

ACT ON LEGISLATIVE DRAFTING AND EVALUATION OF LAW B.E. 2562 (2019) (cont.)

- requires and establishes guidelines for the **publication of, inter alia, legislative texts, statutes and rules, judgments, court or committee decisions in the central system**
- requires **ex post evaluation** of most laws in a comprehensive and systematic matter and disclosure of the results of such evaluation
- assigns the Office of the Council of State (OCS) as the main responsible government agency for the regulatory policy and related matters.

Experiences in post-negotiation implementation : examples of best practices

The aforementioned domestic regulatory reforms help set the stage for effective implementation of RTA/FTA transparency obligations

- ❑ **Before the issuance of notification concerning the determination of origin of goods under any FTA, the Customs Department would hold a public seminar to prepare and assist stakeholders to become acquainted with new rules**
- ❑ **many channels of enquiry/communication, easily accessible to the public, are in place to smoothen the transition to new rules including telephone, email, and Line open chat**

Experiences in post-negotiation implementation : examples of best practices (cont.)

- Comments and feedback are taken seriously. Customs' RoO Section has a **committee whose TASK is to deal with issues or problems pertaining to the implementation of new rules**
- The various channels of communication also provide an **opportunity for the public to raise issues concerning the implementation of FTA obligations by an FTA partner**, e.g. the acceptability of certain formats of customs-related documentation that were not foreseen in some FTAs
- New ministerial regulations or notifications which implement FTA obligations are **made available online** on the relevant agency's website.

Experiences in post-negotiation implementation : examples of best practices (cont.)

- **robust transparency provisions in domestic legislation** are a key enabler of effective implementation of transparency obligations both in regard to existing and potential future FTAs

For example, the Government Procurement and Inventory Management Act B.E. 2560 (2017) sets out **principles and guidelines on transparency in government procurement**. It inter alia requires that government procurement be conducted electronically via a central portal, appropriate timeline and sufficient time period to submit a bid be provided and information on procurement and inventory management be disclosed to the public.

Experiences in post-negotiation implementation : challenges

Language barrier

- **Translating laws and regulations into English** can sometimes pose a challenge. (although most agreements only require publication in the domestic language)
- **Notification of measures by an FTA partner in languages other than English** presents a barrier for domestic stakeholders to understand and become acquainted with such measures. (as pointed out by the Domestic Bureau of Agricultural Commodity and Food Standards (ACFS) which is the domestic enquiry point for SPS matters)

Experiences in post-negotiation implementation : challenges (cont.)

WTO-plus obligations in recent FTAs can sometimes be demanding and require agencies to adjust its practices, e.g., flexible vs fixed timeframes for some transparency obligations

- For example, the WTO TBT Agreement requires that WTO members allow **reasonable time** for other Members to make comments in writing regarding proposed technical regulation, whereas RCEP prescribes a **60-day period**.

Resource/manpower constraints

- For example, the government procurement appeals committee receives tens of thousands of cases, yet it has to meet the 60-day time limit for the completion of appeals as mandated by the Government Procurement Act.

Conclusion

Effective implementation of transparency obligations hinges on:

Domestic regulatory context

- Domestic regulatory reform is a key enabler for transparency principles to be internalized as a domestic legal requirement rather than an externally imposed international obligation.
- This is especially important for economies such as Thailand which has a dualist legal system whereby entering into a treaty with a foreign economy does not automatically give the provisions of that treaty the force of law within Thailand.

Conclusion (cont.)

Effective implementation of transparency obligations hinges on:

Domestic agencies' awareness and perception of the importance/cost and benefit of FTA/RTA transparency provisions

- Agencies should be made aware that while some transparency obligations can present additional workload and thus be perceived as a burden, the implementation of the very same obligations by an FTA partner would bring substantial benefits for domestic stakeholders.
- Ultimately, it should be recognized that transparency obligations are a two-way street, providing reciprocal benefits to all FTA parties.

Conclusion (cont.)

Effective implementation of transparency obligations hinges on:

Close and active communication between parties post-agreement

- There could be a mismatch or a lag in the alignment between the enforced regulation on the ground and what has been understood by the other parties' agencies and constituencies. Mismatches were often manifested at the scene by businesses, and agencies were then informed of the mismatch due to the incidents. The problem is particularly more likely in the area where there are various sub-regulations, and the velocity of the amendment is high.

THANK YOU

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