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A LOOMING CHALLENGE MYANMAR OBLIGATED TO COMPLY WITH ACIA BY 2015

BY WILLIAM GREENLEE AND HUY LUU

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 will be accessible on our website: www.dfdl.com.

A LOOMING CHALLENGE

MYANMAR OBLIGATED TO COMPLY WITH ACIA BY 2015

BY WILLIAM GREENLEE AND HUY LUU



Myanmar is a country on the move. With the gradual transition from military dictatorship to democracy and the passage of a new Foreign Investment Law (“FIL”), investors have been steadily knocking at Myanmar’s door in the past several years. The move from an opaque, centrally-controlled economy to a more open and transparent economy has caused Myanmar to be heralded as the last great Asian market to open to investors. Rich in precious gems and minerals, oil, and natural gas, as well as boasting a population of approximately 60 million, it is understandable why Myanmar has quickly become the darling of foreign investment.

While much has been accomplished in just a few short years, some foreign investors are still anticipating and demanding further progress, particularly with respect to Myanmar’s still underdeveloped legal and regulatory regimes. It is true that in some sectors, compliance with the international standard and the implementation of laws can be slow, but lawmakers are doing their best at legislative reform. In the absence of implementing regulations and guidance for some new laws, the practical application may be inconsistent as lower level officials may not always be familiar with the most recent legal reforms. However, it must be remembered that the country is just three years on from the transition from military rule, and much has been achieved in a short space of time as the government continues to take steps towards a modern, market-based economy.

In addition to the ongoing political and legislative reforms, Myanmar has numerous treaty obligations with which it must comply as a member of the Association of South East Asian Nations (“ASEAN”). Ready or not, Myanmar is obligated to make significant changes in the next two years, which will be vital in gauging Myanmar’s actual progress towards reform.

MYANMAR AND THE ASEAN

Despite economic challenges in other parts of the world, the ASEAN region continues to grow at a rapid pace. As a whole, the Gross Domestic Product (GDP) of ASEAN grew by 5% in 2013 (4.5% in 2011, 5.7% in 2012). Myanmar’s GDP was estimated to have grown 6.8% in 2013 (6% in 2012), which is higher than the region’s average. ^[1]

In terms of foreign direct investment (FDI) inflows, ASEAN attracted a record US\$116 billion in 2013 (US\$111 billion in 2012); this is the highest value ever achieved for FDI since ASEAN’s formation. The rate of ASEAN’s share of the world’s FDI inflows was an impressive 7.9% in 2013 (8.2% in 2012). ^[2]

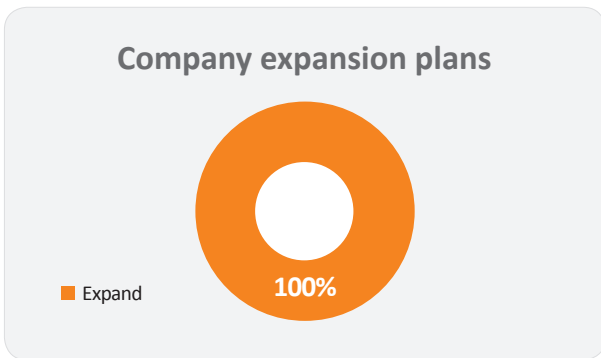
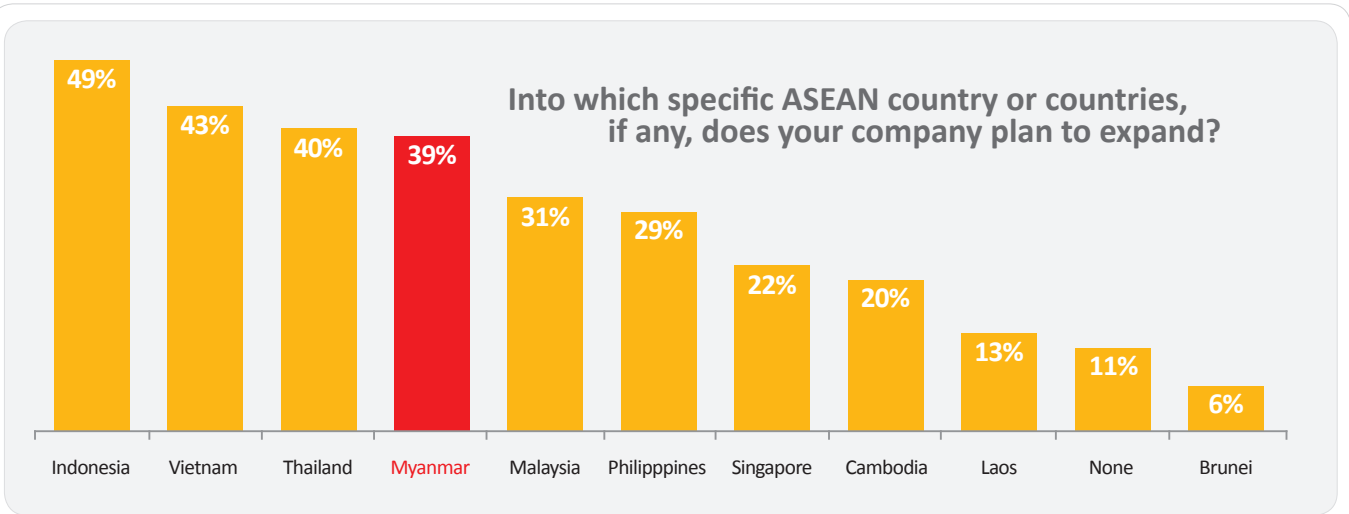
These encouraging results put the ASEAN region ahead of other markets for further investments down the road. Based on a survey taken by the American Chamber of Commerce in Singapore, the most attractive countries for new business expansion in ASEAN are Indonesia, Vietnam, Thailand and Myanmar. In addition, the respondents in the survey overwhelmingly (91%) expect their companies’ trade and investment in ASEAN to increase over the next 5 years, and also cite Myanmar to be part of their business expansion.

Sources :

[1] : IHS Global Insights

[2] : Global Investment Trends Monitor #15 - 28 January 2014 / United Nations UNCTAD

Table 1 : Myanmar based companies expansion plans into ASEAN



Major strengths (% satisfied)

- Personal security (71%)
- Sentiment towards US (71%)

Major concerns (% dissatisfied)

- Infrastructure (93%)
- Housing costs (86%)
- Laws & regulations (86%)
- Office lease costs (79%)
- Availability of trained personnel (71%)
- Ease of moving your products through customs (64%)
- Free movement of goods within the region (50%)
- Corruption (43%)
- New business incentives offered by Gov’t (43%)

Importance of ASEAN markets

- 57% of respondents report that ASEAN markets have increased in importance to their companies over the past two years.
- The majority of respondents (93%) expect ASEAN’s importance to their companies to continue to increase over the next two years.
- 86% regard ASEAN integration as important to helping their companies do business in the region.

Level of trade and investment in ASEAN

- 100% of respondents indicate their companies’ level of trade and investment in ASEAN has increased over the past two years.
- 100% expect their companies’ level of trade and investment in ASEAN to continue increasing over the next five years.



Source : AmCham ASEAN business outlook survey 2014

MYANMAR'S INTEGRATION INTO ASEAN AND THE WORLD

Myanmar's role as a member of ASEAN has been in the spotlight ever since it was announced that, commencing in 2014, Myanmar would hold the ASEAN chairmanship for the first time. This is a critical time for ASEAN, considering that when Myanmar joined ASEAN in 1997, it was met with resistance due to its abhorrent human rights records. Now Myanmar will be at the forefront in delivering key targets and a clear vision which will guide ASEAN for years to come as the process toward total integration marches on. If Myanmar is able to successfully chair ASEAN in 2014, this will certainly support the current government's legitimacy, as the world is watching what will happen in the 2015 national elections.

As the second largest country in mainland South East Asia, with an estimated population of 60 million and a prime location nestled between China and India, two of the world's largest markets, Myanmar is in a position to be one of the most developed nations in the ASEAN region. After five decades of stunted growth due to military control, Myanmar is finally shaking off the shackles of its past and is being hailed as the next Asian Tiger. It is also an opportunity to pursue a process of reform which it has learned from the mistakes of its neighbors.

In addition to being a member of ASEAN, Myanmar is also a member of the World Trade Organization and the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation.

Further, on July 15, 2013, Myanmar acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Myanmar also has tax treaties in force with eight countries: India, Korea, Laos, Malaysia, Thailand, Singapore, UK and Vietnam.

OBLIGATION TO COMPLY WITH ACIA

In 2007, all ASEAN member states took the bold step of adopting the binding ASEAN Economic Community ("AEC") Blueprint, under which all member nations are obliged to take various steps in order to establish the AEC by the end of 2015. The overarching goals of the AEC are to transform ASEAN into: (1) a single market and production base; (2) a highly competitive economic region; (3) a region of equitable economic development; and (4) a region fully integrated into the global economy.

One aspect of achieving the aforementioned goals upon which the AEC will be built is the allowance of the free flow of investment. This is to occur through the implementation of the ASEAN Comprehensive Investment Agreement ("ACIA") by the end of 2015.



THE ASEAN COMPREHENSIVE INVESTMENT AGREEMENT

The stated aim of the ACIA is to create "a liberal, facilitative, transparent and competitive investment environment in ASEAN." ACIA is founded on four basic pillars: (1) investment protection; (2) facilitation and cooperation; (3) promotion and awareness; and (4) liberalization. The ACIA applies to laws and regulations adopted by any ASEAN member state if related to: (1) investors of a different ASEAN member state; or (2) any investments made by an investor from a different ASEAN member state after 29 March 2012. Initially, ACIA will liberalize five business sectors, including cross-border investment in manufacturing, agriculture, fisheries, forestry, and mining and quarrying.

The ACIA embodies international principles of good governance designed to enhance the individual investment climates of the ASEAN member states in order to attract greater amounts of foreign direct investment. ACIA offers protection for all ASEAN investors and their investments in other ASEAN member states. Investments are defined to include every kind of asset, owned or controlled by an investor. ACIA states that the covered assets include, but are not limited to moveable and immovable property and property rights, shares of a company, intellectual property rights, and contractual rights.












The ACIA contains a number of provisions related directly to protecting investors from ASEAN member states and their investments in other member states. These protections include "ensuring fairness" which prohibits member states from making arbitrary decisions and/or discriminating against an investor from another member state in any way. Further, if a host country decides to take legal action against an investor, such investor must be given a full and fair opportunity to defend against any charge of wrongdoing using all legal recourse available to domestic investors.

In addition, host nations must ensure protection and security for all investments made by a member of another ASEAN member state. In cases of strife, including armed conflict or similar events, the host ASEAN member state is required to compensate the investor from the



other ASEAN member state for any loss or damage to the investment. ASEAN member states must also prevent unlawful expropriation, allow for the free transfer of funds without delay and must grant entry and work authorizations to key personnel of the investor. Lastly, the ACIA provides that when an investor suffers a loss or damage arising out of a breach of an ACIA obligation by a host nation, then that investor is guaranteed the right to access dispute settlement mechanisms, including the use of local courts or international arbitration. Further, ACIA adopts non-discrimination principles, including "national treatment" and "most-favored nation treatment", for all ASEAN member states. Under these principles, all ASEAN member states agree not to treat investors from another member state any less favorably than domestic investors. The ACIA additionally states that ASEAN member states will refrain from imposing any performance requirements or production quotas on any investors from another member state. Per Article 9 of ACIA, the individual ASEAN member states have been instructed to submit a list of reserved matters for areas where there will, for the time being, be non-conforming measures and regulations applicable to the five sectors sought to be liberalized under ACIA. While ASEAN members are permitted to make reservations regarding laws and regulations that are not in conformity with ACIA, the member states have also committed to steadily reduce or eliminate the reservations moving forward.

Further, there are reservations made by the member states under the ACIA with respect to sectors covered for liberalization, such as manufacturing, agriculture, fishery, forestry, mining and quarrying. With respect to Myanmar, reservations are made to the foregoing sectors, as well as to land ownership and company incorporation procedures. Certain sub-sectors are not available for foreign ownership (i.e., manufacturing of beverages, alcohol, cigarettes, paper, exploration or mining of gems, etc.), while other sub-sectors require state ownership (i.e., pharmaceutical) or permit state ownership (i.e., petroleum).

Table 2 : Strengths & challenges on local business environment

											
Factors	Regional	Brunei	Cambodia	Indonesia	Laos	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
Personal security	69%	91%	60%	49%	63%	34%	71%	56%	93%	75%	55%
sentiment towards the us	64%	73%	65%	53%	44%	53%	71%	79%	73%	64%	55%
Stable government & political system	51%	73%	45%	37%	38%	47%	50%	62%	90%	45%	38%
Tax structure	40%	45%	45%	45%	50%	41%	50%	57%	56%	84%	43%
Availability of low cost labor	36%	73%	65%	53%	63%	53%	43%	74%	48%	40%	59%
Availability of trained personnel	41%	55%	55%	39%	69%	44%	71%	87%	67%	42%	43%
Ease of moving your products through customs	35%	36%	50%	45%	44%	56%	64%	44%	64%	30%	46%
Free movement of goods within the region	41%	36%	40%	35%	50%	47%	60%	41%	66%	40%	43%
Infrastructure	48%	36%	45%	65%	63%	84%	93%	54%	89%	56%	65%
New business incentives offered by government	36%	45%	40%	47%	38%	44%	43%	44%	65%	42%	49%
Availability of raw materials	33%	55%	50%	37%	38%	38%	43%	38%	33%	35%	35%
Local protectionism (or lack of)	41%	64%	45%	43%	44%	50%	50%	46%	60%	40%	46%
Office lease costs	34%	36%	40%	45%	63%	53%	79%	51%	54%	51%	35%
Housing costs	39%	46%	55%	45%	44%	41%	86%	56%	71%	52%	45%
Laws & regulations	37%	55%	60%	65%	63%	41%	86%	46%	84%	42%	59%
corruption	48%	82%	65%	80%	76%	53%	43%	59%	87%	71%	70%

strength
 weak strength
 neutral
 weak concern
 concern

Source : AmCham ASEAN business outlook survey 2014

CURRENT SITUATION AND THE ROAD FORWARD

Myanmar is not currently in compliance with many of the provisions of the ACIA. Bringing Myanmar into complete compliance by the end of 2015 will be challenging and may end up extending beyond the initial deadline contained in ACIA. Many restrictive domestic laws and regulations will need to be eliminated or amended to provide an exemption to investors from the other ASEAN member states.

By way of example, we highlight a few of the changes that will in time need to be made for Myanmar to be compliant with ACIA. The 2012 Foreign Exchange Management Law ("FEML") mandates that foreign investors receive approval from the Central Bank of Myanmar prior to making capital account remittances abroad (e.g. the payment of a dividend). Meanwhile, ACIA calls for the free flow of capital in and out of Myanmar to other ASEAN member states. Thus, the FEML must be amended to provide an exemption for ASEAN member states in order to comply with ACIA.

Notification No 11/2013 issued by the Ministry of National Planning and Economic Development (the "FIL Rules") pursuant to authority granted under the FIL prescribes certain areas in which foreign

investment is not permitted. Schedule 4 to the FIL Rules provides that a number of fishing activities are reserved to Myanmar citizens, whereas ACIA lists this specific activity as a sector where cross-border investment is to be liberalized. In addition, small scale mining activities are also reserved to Myanmar citizens under the FIL Rules, whereas ACIA also seeks to liberalize investment in this sector between ASEAN member states as well.

Reforming the above mentioned laws is only a few examples of the necessary changes in which Myanmar will have to complete in order to comply with the provisions of ACIA. It is unknown whether the Myanmar Government will seek to repeal, in part or in full, many of the laws that contradict the provisions of ACIA or whether amendments will be made to exempt investors from ASEAN member states from their coverage. There are some indications that the Myanmar Government is motivated to comply with the provisions of ACIA and there is thus some optimism of success. If so, in the end it appears to be more a question of timing as much work lies ahead and the agreed upon deadline in the AEC Blueprint is looming.

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