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The long road ahead: Implementing the Asian Economic Community (AEC)

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Myanmar's political and economic transition from a military dictatorship to the last economic frontier in Asia has been the subject of wide interest in the international business community. Investors were spurred to action in 2012 with the passage of the ground breaking Foreign Investment Law (FIL), which some would say marked the official entry of Myanmar into the world economy. As a country rich in natural resources and with an estimated population of over 60 million people, it is understandable why Myanmar has quickly become a prime target for foreign investment.

According to the Directorate of Investment and Company Administration (DICA), Myanmar attracted US$4.1 billion of Foreign Direct Investment (FDI) during the fiscal year ending 31 March 2014. This is up threefold from the previous fiscal year, where Myanmar received only US$1.42 billion in FDI and is nearly double the annual average FDI amount received since 1988. This upward trend is projected to increase year over year. A 2013 report released by the McKinsey Global Institute projected that Myanmar would see upwards of US$100 billion in FDI over the next two decades, while at the same time, quadrupling its Gross Domestic Product (GDP) over that period.

Despite the continuing reform efforts by the Government and the staggering increase in FDI, some investors are beginning to grow restless and demand faster progress. Still underdeveloped legal and regulatory regimes impose a variety of stumbling blocks on new investors to Myanmar, frustrations which would be eased with greater reforms. The next two years will be vital in assessing Myanmar's reform efforts. Coupled with the need to assuage the consternation of foreign investors demanding progress, Myanmar has numerous treaty obligations as a member of the Association of Southeast Asian Nations (ASEAN) with which it must comply. To this end, the Minister of National Planning and Economic Development announced in May 2014 that Myanmar would take all necessary steps to implement the ASEAN Economic Community (AEC) by the start of 2015. It appears to be full speed ahead in Myanmar's efforts to once again become a regional economic power as it had once been.

Myanmar's integration into a position of leadership in ASEAN

Despite the recent global economic downturn suffered by much of the Western World, the ASEAN Region has continued to grow at a rapid pace. As a whole, the GDP

of ASEAN grew by 5.7% in 2012 and 5% in 2013. Myanmar however outpaced the rest of ASEAN with its GDP estimated to have grown by 6% in 2012 and 6.8% in 2013.

Ever since it was announced that starting in 2014 Myanmar would hold the ASEAN chairmanship for the first time, Myanmar's role with ASEAN has been highlighted. Coupled with its accelerating GDP growth, Myanmar is poised to be among the foremost leaders driving the economic engine of ASEAN.

As the march towards ASEAN integration continues, Myanmar will be responsible for delivering key targets and a clear vision that will guide ASEAN during this critical time.

There has been some progress in issuing new laws that encourage foreign investment however there is still a long way to go. The Government continues to work toward this end with Ministries drafting laws, which Parliament will reportedly review and hopefully pass up to 51 this session. Ready or not, Myanmar is obligated to make significant changes within less than two years.

Obligation to implement AEC

In 2007, all ASEAN member states took the bold step of adopting the binding AEC Blueprint, under which all member nations are obliged to take various steps in order to establish AEC by the end of 2015. The overarching goals of 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.

AEC areas of cooperation include the development of human resources and capacity building, recognition of professional qualifications, closer consultation on macroeconomic and financial policies, trade financing measures, enhanced infrastructure and communications connectivity, development of electronic transactions and integrating industries across the Region to promote regional sourcing and enhancing private sector involvement to establish AEC.

AEC is intended to transform ASEAN into a Region that comprises the following core elements: (1) free flow of goods, (2) free flow of services, (3) free flow of investment, (4) free flow of capital, and (5) free flow of skilled labour.

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ASEAN Comprehensive Investment Agreement

One important aspect of achieving the aforementioned goals upon which AEC will be built is the allowance of the free flow of investment. This is to occur through the implementation of ASEAN Comprehensive Investment Agreement (ACIA) by the end of 2015. The ACIA is similar in many respects to a bilateral investment treaty.

The stated aim of 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) liberalisation. 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. ACIA will initially liberalise five business sectors, including cross-border investment in: manufacturing, agriculture, fisheries, forestry, mining, and quarrying.

ACIA embodies international principles of good governance designed to enhance the individual investment climates of ASEAN member states in order to attract greater amounts of FDI. 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 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.

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 that investor must be given a full and fair opportunity to defend against any charge of wrongdoing using all legal recourse available to domestic investors. Additionally 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 authorisation to key personnel of the investor. Lastly, ACIA provides that when an investor suffers a loss or damage due to a breach of ACIA 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-favoured 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. ACIA additionally states that ASEAN member countries will refrain from imposing any performance requirements or production quotas on any investors from another member state.

Regarding Article 9 of ACIA, the individual ASEAN member states have been instructed to submit a list of reserved matters for areas where there will be temporarily non-conforming measures and regulations applicable to the five sectors sought to be liberalised 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.

ASEAN member countries, under ACIA, have reserved to their citizens certain activities in sectors covered for liberalisation. These sectors include: manufacturing, agriculture, fishery, forestry, mining, quarrying and are permitted to reserve certain activities to their citizens. Myanmar has made reservations in the foregoing sectors and will additionally retain the prohibition on the ability of foreign persons to transfer ownership of immovable property as well as the company incorporation procedures for a foreign invested company.

World Trade Organisation (WTO) implications

Under ACIA, a country that is a WTO member is not automatically given the same benefits as an ASEAN member. Despite the WTO stating that all members be given most favoured nation status, this does not appear to always be the case. ASEAN countries will receive higher benefits and lower tariff rates than non-ASEAN WTO members.

Current situation and the road forward

Myanmar is not currently in compliance with many of the provisions of ACIA. Bringing Myanmar into complete compliance by 2015, will be a significant task and will likely extend beyond the initial deadline contained in ACIA. Myanmar has pledged to implement AEC on the original schedule. However, it is possible that a number of the benefits provided for in ACIA may have to be delayed and adopted in time. U Kan Zaw, the Minister of National Planning and Economic Development, recently stated 50% - 60% of the needed reforms were complete but that much more needed to be done.

There are several key issues that will need to be addressed for Myanmar to be compliant with ACIA. Prominent examples of these issues include the 2012 Foreign Exchange Management Law (FEML), which 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 countries.

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 as a sector where cross-border investment is to be liberalised. Similarly small scale mining activities are currently reserved for Myanmar citizens despite the ACIA goal of liberalising mining investments for all ASEAN member states.

Reforming incongruous laws is a monumental challenge, one the Government has said it will achieve and does appear to be focused on. In the end the Government may also choose to exempt investors from ASEAN member countries from such incongruous laws. Regardless of the final outcome, much work lies ahead while AEC Blueprint deadline looms.