



THE commitments by Asean towards the Asean Economic Community (AEC) are promising. However, more seasoned investors will realise that there is often a gap between theory and practice, especially in the less developed nations within Asean. As the World Bank's *Doing Business Report 2016* has shown, a number of Asean member states such as Myanmar, Laos and Cambodia remain at the bottom half of the global rankings when it comes to starting and operating businesses in the respective countries.

Investors should be mindful of the continued existence of non-tariff barriers which stand in the way of a *de facto* single AEC market.

NEGATIVE LISTS

With the exception of Singapore, all nine other Asean member states are still classified as emerging and developing economies according to the International Monetary Fund's 2015 *World Economic Outlook Report*. Given their stages of development, it is conceivable that some member states may take a more protectionist approach when opening its doors to foreign investors for fear of undermining local players or paving the way for exploitation of the country's market or resources by foreign companies.

A number of Asean member states continue to restrict foreign participation in certain industries. Some choose to institute a negative list which sets out sectors where either foreign investment is prohibited or restricted by way of measures such as specific government approvals and foreign equity limits. Sectors that are not prescribed in such lists are technically open for foreign investment.

In Thailand for example, foreign investments are restricted for three categories under the Foreign Business Act. Other than sectors that are prohibited, some are only allowed with approval from the appropriate ministries while the rest require permission from the Director-General of the Department of Business Development of the Ministry of Commerce and the Foreign Business Committee. The sale of consumer goods and provision of engineering services are examples of sectors falling within the third category.

In reality, foreigners usually face practical difficulties when applying for such foreign business licences in Thailand as there is no assurance that approval will be granted. The authorities have the discretion to consider a broad range of factors such as economic and social impact, possible effects on consumer protection and environmental conservation. Applicants are also usually required to submit a "technology transfer plan" to demonstrate how locals can benefit from the transfer of know-how and new technology from the proposed foreign investment. Although the Foreign Business Act stipulates that the authorities must make its decision within 60 days of an application, those who are familiar with the process will know that subsequent requests for supporting documentation from the officers tend to prolong this approval process.

Myanmar similarly categorises industries that are prohibited, restricted and those subject to specific approvals. In August 2014, the country enacted new regulations to clarify and streamline the sectors in which foreign investment is prohibited or restricted. Myanmar has progressively liberalised its industries to welcome foreign investments in recent years although there is still uncertainty on the specific procedures for obtaining recommendations and approvals from relevant ministries. The wide discretion afforded to each government agency may result in differing interpretations and applications of the law. What is encouraging is that most service sectors in Myanmar are open to foreign participation although on occasion,

MIND THE GAP

Despite the headway made towards the AEC, investors should be mindful of the continued existence of non-tariff barriers which stand in the way of a single market **BY CHESTER TOH & TAN JEN LEE**

certain policies have been put in place to restrict foreign participation even though there is nothing in the law that limits investment by a foreign company.

GENERAL RULES

Investors often struggle when investing in developing AEC economies because of varying interpretations by regulators of written laws as well as the administration of policies which are not necessarily consistent with the prevailing law. At times, policy changes may be implemented at short notice, often leaving foreign investors with very little time to react.

For instance in Myanmar, the Ministry of Commerce has a general policy that prohibits foreigners from engaging in trading activities. This unwritten administrative policy bars foreigners from importing goods in order to resell them in the domestic market although foreign investors may import raw materials and machinery for undertaking manufacturing activities. This policy does not appear to be derived from any specific legislation although in recent months, regulations have been instituted to liberalise trading in selected sectors.

Most Asean member states have worked towards a relaxation of such policies in the past year. The Indonesian government is planning to revise its negative investment list in the first half of 2016 to relax foreign ownership requirements for certain sectors although there have been concerns that some sectors may be subject to more stringent foreign ownership limits as part of the review. In late 2014, Vietnam undertook pro-investor reforms by removing the 49 per cent foreign ownership cap on public companies in a bid to allow foreigners 100 per cent ownership of some of the largest companies, although the banking sector still remains tightly controlled.

LICENSING REGIMES

Besides general investment licences, foreign investors are often subject to further regulatory hurdles in relation to obtaining sector-specific licences and permits. Although it is not unusual for investors to require specific licences to operate in particular sectors, the difficulty lies with the discrepancies between what is stated in the relevant laws and how regulators have often exercised their discretion in applying such laws in practice.

The TV and broadcasting sector for instance, is often a sensitive industry closed off to many foreign investors. Nevertheless, on Aug 28, 2015, the Myanmar Parliament enacted the TV and Broadcasting Law which appears to allow foreigners to hold up to 30 per cent interest in a commercial broadcasting service, subject to approval from the TV and Broadcasting Council under the Myanmar Ministry of Information. This is a surprising liberalisation for a country which had been under strict military rule until 2011. However, the law does not specify how many broadcasting licences will be offered to private investors, and it is still unclear as to the proportion of licences which will actually be issued to foreign investors.

To add to the opacity of processes and licensing regimes within Asean member states, certain applications for licences and permits also contain hidden processing fees not provided for under any written law or regulation. In Cambodia for example, investors may from time to time discover such "hidden costs" when submitting their licence applications. These hidden costs are generally non-regulated facilitation fees paid to government officials to expedite application processes. Investors should familiarise themselves with anti-bribery laws of their home countries that may have extra-territorial effects as well as domestic anti-corruption laws as facilitation payments of this nature may well be prohibited, as is the case under the Cambodian Law on Anti-Corruption.

ROOM FOR LIBERALISATION

While it is not feasible to expect a complete removal of all forms of foreign investment restrictions in Asean member states, there is still room for greater trade liberalisation and clarification of existing policies if the Asean countries are truly committed towards a single integrated market. With the right advisers who are well-versed to help you navigate both the legal and regulatory environment of Asean member countries, any ambitious SME can reap the rewards of this US\$2.4 trillion economic bloc. ■

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